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Articles

Rescuing Reliance: The Perils of Promissory Estoppel

by
CHARLES L. KNAPP*

I reckon I got to light out for the Territory ahead of the rest, because Aunt Sally she's going to adopt me and sivilize me and I can't stand it. I been there before.¹

'Way back in 1980, three presidents and three grandchildren ago, I was invited—along with many others concerned with contract law—to contribute a short piece to the *Columbia Law Review's* symposium on the then-recently-promulgated Restatement (Second) of Contracts.² Choosing as my topic the general area of promissory estoppel, I attempted to identify and describe the various ways in which the new Restatement went beyond that doctrine's original formulation to elaborate on and widen the role which reliance-protection could perform in the general area of promissory obligation.³ While I dutifully tried to point out as many shortcomings in the enterprise as I could find, in order to renew my scholar's license for the new decade, the

* Distinguished Professor of Law, Hastings College of the Law; Max E. Greenberg Professor Emeritus of Contract Law, New York University School of Law. This article grew out of a presentation made while I was a Visiting Professor at Hastings in the fall of 1996, and was completed during my final year at N.Y.U. I am grateful to my Contracts colleagues at those schools and to my casebook co-authors Nathan Crystal and H.G. Prince for their encouragement and advice. I also owe a debt of gratitude for financial support received from the Filomen D'Agostino Greenberg and Max E. Greenberg Research Fund of New York University School of Law. And finally, I owe an unrepayable debt to Daniel Laguardia, N.Y.U. J.D. Class of 1998, without whose unrelenting assistance this article would have been probably shorter, but surely poorer. Errors remaining can be blamed on nobody else but me.

1. MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* 366 (Oxford ed. 1996).

2. The full symposium can be found at *Symposium on the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981).

3. See Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981) [hereinafter *Proliferation*].

overall thrust of that piece was clearly that Promissory Estoppel, like Love, is Here to Stay and a Good Thing, Too. Indeed, perhaps swept away with my own enthusiasm, I proposed at one point that promissory estoppel had become "perhaps the most radical and expansive development of this century in the law of promissory liability."⁴ At the time, this hyperbolic endorsement seemed perhaps appropriate but certainly unnecessary; with or without my help, promissory estoppel was doing just fine, thank you, and showed every indication of continuing to do so.

As the last sands of this century slip ever more rapidly through the glass, a reassessment appears to be in order. With hindsight, 1980 may have been the high-water mark for promissory estoppel, at least in the eyes of many commentators. Since that time, a succession of articles has called into question virtually every aspect of that doctrine: its essential nature, its utility, even its viability as a part of the living law of contract. This article is my attempt to survey some of the history of promissory estoppel, old and new, and to offer some thoughts of my own on whether and why it should remain on the sled as we mush toward the millennium.

In the discussion below I will first offer my own version of the obligatory thumbnail sketch of the development of promissory estoppel over the last century. (Most of this is familiar stuff to contracts teachers and students, but a brief refresher may not hurt.) I will then describe and respond to some of the commentary that has appeared since 1980, commentary which variously discusses, deconstructs, and, in some cases, denigrates and dispatches promissory estoppel as previously understood. I will then offer some thoughts of my own about the importance—both practical and symbolic—of promissory estoppel as a part of our vision of contract law.

I. Historical Development

It has become commonplace to speak of American contract law as having a "classical" period and a "modern" one—the sort of oversimplification that blurs a lot of detail, but can nevertheless be helpful in contrasting what seem to be the most salient characteristics of different times. Given the way the world has turned since the Restatement (Second)⁵ was adopted, we appear to have passed beyond what

4. *Id.* at 53. This language has been frequently quoted, probably because of its "sound-bite" size and flavor. See, e.g., Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

5. RESTATEMENT (SECOND) OF CONTRACTS § (1981) [hereinafter RESTATEMENT (SECOND)].

was then the "modern" era, on to something else. The essential nature of that something else is, as yet, still unclear. For the purpose of this discussion, I will therefore divide the recent history of contract law into three parts: the classical period (roughly 1880-1930); the modern period (1930-1980); and—for want of a more descriptive label—the postmodern⁶ period (1980 to the present).

A. The Classical Period

In his widely-noted discourse on *The Death of Contract*,⁷ Grant Gilmore attributed the essential shape of classical contract law to three Harvard law professors: Langdell, Holmes and Williston. By 1880, the first two members of Gilmore's triumvirate of classical architects were already busily sketching the outlines of what would become the generally accepted structure of American contract law. Christopher Columbus Langdell had for ten years been Dean of the Harvard Law School and had already published his casebook on Contracts.⁸ By 1880 he had produced the casebook's second edition, with an appended summary of the law of contracts,⁹ thereby solidifying his claim to be seen as the father of both systematized contract law and the case-method of law study.¹⁰ At the same time, Oliver Wendell Holmes, Boston Brahmin, Civil War veteran and Olympian-to-be,¹¹ was preparing to deliver his 1881 lectures on the Common Law. These lectures—whatever their historical foundations, or lack thereof—would reshape our law of both tort and contract.¹² By 1930, half a century later, Gilmore's third musketeer, Samuel Williston, had

6. Postmodernism, defined as "a movement or style . . . characterized by a departure from or rejection of 20th century modernism (including modern or abstract art, avant-garde writing, functional architecture, etc.) and represented typically by works incorporating a variety of classical or historical styles and techniques," William Safire, *Post-Modernism Out, Neopuritanism In*, N.Y. TIMES, Jan. 22, 1989, § 6, at 10, (quoting CLARENCE L. BARNHART ET AL., THE SECOND BARNHART DICTIONARY OF NEW ENGLISH (1980)), has been taken by the public "to mean 'the latest thing, more modern than modern.'" *Id.* Both definitions could be employed in this case.

7. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

8. See CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS* (1871).

9. See C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES* (2d ed. 1879).

10. And earning the gratitude of generations of law students yet unborn.

11. See CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1944). For slightly less adulatory biography see, LIVA BAKER, *THE JUSTICE FROM BEACON HILL* (1991), or SHELDON M. NOVICK, *HONORABLE JUSTICE* (1989).

12. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

produced his encyclopedic treatise on the common law of contract¹³ and was shepherding into existence the Restatement of Contracts,¹⁴ a work which would mark both the dawn of the age of Restatements and the apogee of the classical contract rule-system.

(1) *Consideration—The Ascendancy of Bargain Theory*

One of the principal tenets of this new systematized contract structure was its reconsideration of consideration itself, the gatekeeper of contractual liability.¹⁵ By the late nineteenth century, it had become conventional in English and American law to refer to “consideration” as the factor necessary to make a promise enforceable. As the test for that requirement, one would look for either a “benefit” or a “detriment”—a benefit received by the promisor, or some loss or injury suffered by the promisee in connection with the promise.¹⁶ In Holmes’s view, however, the requirement of consideration could be better understood when seen as one element of an exchange transaction. The promise was supported by consideration, and was qualified for enforcement, when the promisor had received something in exchange for her promise, or the promisee had given something for it. That something might have been an actual performance, or merely the promise of one, but in either case it had to be regarded by the parties as the exchange which induced the making of the promise, both ostensibly and (at least in part) actually.¹⁷

Deceptively similar to the doctrine it replaced—so similar, in fact, that even modern courts are apt to invoke both formulations when a consideration issue arises (and probably with similar results)¹⁸—the bargain theory was in several respects more notable for what it excluded than for what it included. By insisting that the “detriment” suffered by the promisee be given in exchange for the promise, the new dispensation effectively ignored the possibility of the promisee’s substantial change of position in reliance on the promise, not bargained for as the price of the promise, but substantial and detrimental nevertheless. And by concentrating on the exchange trans-

13. See SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920).

14. RESTATEMENT (FIRST) OF CONTRACTS (1932) [hereinafter RESTATEMENT (FIRST)].

15. See generally Mark B. Wessman, *Should We Fire The GateKeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 45-46 (1993) (discussing the decline of the theory that consideration is necessary to enforcement).

16. See E. ALLAN FARNSWORTH, *CONTRACTS* § 1.6 (2d ed. 1990) [hereinafter FARNSWORTH, *CONTRACTS*].

17. See GILMORE, *supra* note 7, at 19-21 (discussing and quoting OLIVER HOLMES, *THE COMMON LAW* 227-30 (Mark DeWolf Howe ed., 1963) (1881)).

18. See, e.g., *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248, 1250 (Pa. Super. Ct. 1989).

action as the *raison d'être* of contract, the bargain theory marginalized many significant promissory transactions in other areas, such as intra-family promises or promises made to charitable institutions. Such promises could probably be more accurately characterized as "gifts" than as "bargains," even though they were likely in many cases to have been made out a complex of motives including more than pure altruism.¹⁹ On the other hand, by stressing the law's willingness to enforce bargains per se, whatever their terms, Holmesian contract doctrine moved away from earlier equitable notions of "just price" or "unconscionability" toward the proposition that virtually any exchange-based bargain, no matter how lop-sided, could and probably would be upheld as consideration-supported.²⁰ The result was a doctrine of consideration well adapted to free-market transactions among well-counseled bargainers, and not much else.

Once elaborated, this new view of consideration proved remarkably prolific. Its offspring included an insistence on the free revocability of offers (regardless of the offeror's assurances to the contrary, unless consideration had been given for the formation of an option contract),²¹ the "pre-existing duty rule" (potentially invalidating many settlement agreements),²² and its corollary, the "one-sided modification" rule (requiring fresh consideration on both sides for any change in the obligations imposed by an already-existing contract).²³ Despite the logical strength of the case for these various propositions as deductions from the basic consideration principle, collectively they added up to a rather substantial constraint on the freedom of bargainers to make or remake their agreements. By the time the Restatement (First) adopted Holmes's bargain theory across the board (in the form of section 75, plus related sections), there had been numerous calls from commentators for amelioration of at least some of consideration's ramifications, if not for wholesale abrogation of the doctrine itself.²⁴ But Williston remained steadfast, and at the

19. By the same token, the ostensibly bargained-for promise might be made, at least in part, for motives other than a desire to receive the promised exchange, as Oliver Holmes himself recognized by stressing the "conventional" nature of the reciprocal inducement involved. See Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 275 (1996).

20. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1869* (1977). For a criticism of Horwitz's analysis, see A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

21. See RESTATEMENT (FIRST) § 47.

22. RESTATEMENT (FIRST) § 76(a) ("An act or forbearance required by a legal duty is not consideration.").

23. See, e.g., *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902).

24. See, e.g. Corbin's critique of consideration as related by GILMORE, *supra* note 7, at 63; 8 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 471 (1926); Ernest G.

apogee of the classical era, bargained-for exchange held the high ground of contract law.

(2) *The Emergence of Promissory Estoppel*

During much of this period, even as the doctrinal stones were being laid for the ramparts of contract's new citadel, the winds of change were blowing outside. Doctrinal refinements notwithstanding, cases continued to appear in which seriously made promises had engendered unbargained for, but substantially detrimental, changes of position on the part of trusting promisees. Some of these cases involved intra-family promises, such as promises to make a marriage settlement, to convey land or pay money; some were charitable subscriptions, later revoked by the promisor or her survivors; some were made in a business context, but not explicitly in exchange for any "price," performed or promised.²⁵ Faced with transactions that failed to conform to the new "bargain" paradigm, some courts, with evident effort, forced these cases into the bargain mold;²⁶ others simply gave up, and fell in line with the new orthodoxy.²⁷ A substantial number, however, found ways to justify the enforcement of promises in such circumstances. Some courts explained their decisions in terms of "estoppel": "estoppel in pais," "equitable estoppel," or just plain "estoppel"—and, eventually, "promissory estoppel," to distinguish these broken-promise cases from others involving reliance on statements of fact.²⁸ By thus building on existing terminology, these courts were able to persuade themselves, perhaps, that they were merely doing what courts had always done. (And indeed that may have been the case, if the bargain theory of consideration with its disregard of reliance was truly a latter-day invention of Holmes and his cohorts, as Gilmore's story runs.²⁹)

By the time the first Restatement of Contracts was being drafted, it was possible to stitch those various scraps of case law into a patch-

Lorensen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919). See also K.N. Llewellyn, *On the Complexity of Consideration: A Foreword*, 41 COLUM. L. REV. 777 (1941) ("What is known or believed about consideration . . . I take to be in the realm of what we call today philosophy, as distinct from science."); Lord Wright, *Ought the Doctrine of Consideration be Abolished from the Common Law?*, 49 HARV. L. REV. 1225 (1936).

25. For a discussion of these cases, see Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950).

26. See, e.g., *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935); *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927).

27. See *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W. 2d 661 (Minn. 1960).

28. See *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

29. See GILMORE, *supra* note 7, at 20-21; see also Holmes, *supra* note 19, at 271-76.

work quilt, and to see in that quilt a recurring pattern of enforcement based on discernible injury to the promisee, resulting from actions taken on the strength of a reasonable expectation of performance by the promisor. Whether Gilmore's dramatic account of the role played by Arthur Corbin in promissory estoppel's genesis is literally true or not,³⁰ we can see in Restatement (First) section 90 an attempt to draw from the case law a principle that could be stated abstractly (and illustrated abstractly, in the Restatement's conventional "A promises B" fashion) as a separate basis for promise enforcement, distinct from the bargain theory of consideration stated in section 75.

Section 90 of the Restatement (First) was captioned "Promise Reasonably Inducing Definite and Substantial Action."³¹ That title not only accurately labeled the rule that followed, it virtually stated it in full. Besides repeating the caption's ingredients of "a promise" which does in fact "induce action or forbearance of a definite and substantial character" which the promisor should "reasonably expect," the text of the section itself added only one more element: it must appear that "injustice can be avoided only by enforcement of the promise."³²

So stated—or "restated"—the new principle of "promissory estoppel" was available to any court disposed to utilize it. If Corbin was right about its case-law foundations, the new rule should have found wide employment in the courts, and with time it did.³³ But Grant Gilmore, looking back across nearly half a century, viewed the Restatement (First's) adoption of the reliance principle as more than just another addition to the judicial tool kit, a more efficient device for doing what the courts were generally getting done anyway. In the "schizophrenia" of sections 75 and 90 Gilmore saw a fundamental contradiction that would inevitably lead to the disintegration of the classical system. "We have become accustomed to the idea," he asserted,

without in the least understanding it [a characteristic Gilmorean aside], that the universe includes both matter and anti-matter. Per-

30. See GILMORE, *supra* note 7, at 62-65. Despite the appeal of this story, commentators have cast doubt on its authenticity. See, e.g., Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 962 n.55.

31. RESTATEMENT (FIRST) § 90.

32. *Id.*

33. See Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 352 n.37 (1969) (claiming that in 100 decisions in the preceding 10 years, promissory estoppel had replaced applicable bargain exchange theories). For an in depth analysis of the gradual adoption of promissory estoppel by the fifty states, see Holmes, *supra* note 19.

haps what we have here is Restatement and anti-Restatement or Contract and anti-Contract. . . . The one thing that is clear is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up.³⁴

B. The Modern Period

The world in 1930 stood poised on the brink of immense change. The Twenties had roared through, leaving a post-Prohibition hangover in their wake; the 1929 market collapse had presaged the Great Depression of the Thirties, which in turn would inspire the New Deal; the seedlings of World War II were germinating in the soil of Versailles. Not surprisingly, change was stirring in the academic/legal community as well. Even as the courts were poised to embrace the new wave of Restatements, Roscoe Pound, Karl Llewellyn and other Legal Realists were arguing persuasively that law was to be found not in rule books or syllogisms but in the hearts and minds of legislator/judges, conscious of their institutional responsibility to shape law as an instrument of social welfare.³⁵ Llewellyn's vision was eventually to bring forth Article 2 of the Uniform Commercial Code [hereinafter U.C.C.], whose spirit had, by 1980, infused the Restatement (Second) of Contracts, the embodiment of "modern" contract law.

During this period, the star of promissory estoppel continued to ascend. Originally seen as particularly suited for use in non-commercial settings, such as situations involving intra-family promises and charitable subscriptions, its application was eventually extended—over some strong objections³⁶—into commercial settings as well. There, it was employed to compensate those who reasonably relied on business promises freely given but never performed. Gratuitous "firm" offers, voluntary waivers, one-sided modifications, all sorts of assurances freely made and reasonably relied on—such expressions of commitment, which under the bargain theory could usually be freely repudiated for lack of consideration, became binding obligations with the doctrinal Krazy Glue of promissory estoppel.³⁷

At the same time as reliance was finding increased employment as a basis for the imposition of promissory obligation, the notion of reliance as a basis for remedial compensation was attracting increasing attention. In a path-breaking 1936 article, *The Reliance Interest in*

34. GILMORE, *supra* note 7, at 61.

35. For background on the Legal Realists, see WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1985); N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997).

36. See, e.g., *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933).

37. See Henderson, *supra* note 33, at 353-55 & nn.50 & 52 (citing cases).

Contract Damages,³⁸ Professor Lon Fuller and his student/associate William Perdue identified three “remedial interests”—expectation, restitution and reliance—and the greatest of those, they intimated, was reliance. Where reliance as the basis for promissory estoppel appeared to serve principally as a basis for the imposition of obligation in the absence of conventional consideration, Fuller and Perdue suggested that the facilitation and protection of reliance could be seen as an underlying goal of all of contract law, including even the enforcement of purely executory agreements and the award of “expectation damages” for contract breach.

Judges and commentators alike found merit in the Fuller/Perdue analysis, and took to using their set of remedial interests as a conceptual framework for the law of damages in contract cases.³⁹ A bit fuzzily, the Restatement (Second) followed suit.⁴⁰ This new emphasis on the importance of reliance, although not addressed specifically to the notion of promissory estoppel as expressed in section 90, had its effect in that area nevertheless. On the one hand, *The Reliance Interest* seemed to validate Corbin’s insight that reliance protection was a basic and legitimate goal of contract law. On the other hand, emphasis on reliance protection as a remedial goal strengthened the hand of those who argued that the remedy in promissory estoppel cases should ordinarily be limited to compensation for injury to the promisee’s reliance interest, and should not extend to the lost expectation (the ordinary measure in conventional breach of contract cases).⁴¹

This debate led to some changes in the Restatement (Second) version of section 90, in order to accommodate the notion that reliance damages either should, or at least could, be a sufficient remedy in promissory estoppel cases.⁴² Commentators have since differed over both the wisdom and the effect of this tinkering,⁴³ but overall the

38. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); see also L.L. Fuller and William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937).

39. See e.g., *Twin City Fire Ins. Co. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1425 (9th Cir. 1986); Robert E. Hudec, *Restating the “Reliance Interest,”* 67 CORNELL L. REV. 704, 705-6 & n.3 (1982) (noting that the cases citing the article enjoy a “leading case” prominence, and listing cases); Todd D. Rakoff, *Fuller and Perdue’s The Reliance Interest as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203; Fred R. Shapiro, *The Most Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1462 (1991) (listing this article as the ninth most cited).

40. See RESTATEMENT (SECOND) § 344. For a general discussion of affected sections, see Hudec, *supra* note 39, at 706.

41. See, e.g., Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 941-45 (1937).

42. See *Proliferation*, *supra* note 3, at 55-58.

43. Compare Yorio & Thel, *supra* note 4, at 112 (arguing that reliance is not, and

revised section 90 seemed designed generally to continue the work begun by its predecessor. And just as consideration had done in the classical era, promissory estoppel generated doctrinal spin-offs of its own.⁴⁴ Building on existing case law, other sections of the new Restatement extended the reliance-protection principle to firm offers,⁴⁵ waivers and modifications,⁴⁶ promises lacking in definiteness,⁴⁷ and even oral agreements failing to satisfy the statute of frauds.⁴⁸

As the Eighties began, courts and commentators alike were beginning to see promissory estoppel as not merely a stepchild of contract law, but perhaps a new and distinct cause of action in its own right.⁴⁹ Even Karl Llewellyn's "modern" version of the statute of frauds (in U.C.C. section 2-201) frequently bowed to its power.⁵⁰ Partisans of promissory estoppel confidently predicted that victory over the parol evidence rule was only a matter of time.⁵¹ And reliance-protection appeared to some to be on the brink of displacing compensation for lost expectation as the central organizing principle of con-

need not, be the limit of damages resulting from promissory estoppel cases) *with* Boyer, *supra* note 25, at 494-98 (arguing that there is no need to give damages beyond the reliance interest) and Holmes, *supra* note 19, at 289-90 (citing 20 jurisdictions that award reliance damages in promissory estoppel cases). In a recent study, Professor Robert Hillman concluded that the courts in promissory estoppel cases award damages flexibly, rather than routinely awarding expectation damages, as other commentators have asserted. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 615-18 (1998).

44. See generally *Proliferation*, *supra* note 3 (elaborating on the expanded use of promissory estoppel in Restatement (Second)).

45. See RESTATEMENT (SECOND) § 87.

46. See *id.* at §§ 84, 89.

47. See *id.* at § 90. Promises so indefinite as to lack any sort of commitment would presumably fail to satisfy even section 90, but courts, in applying that section, have frequently been willing to tolerate a degree of indefiniteness that might have been fatal were the existence of an "offer" at issue. See, e.g., *Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc.*, 704 A.2d 1321 (N.J. Super. Ct. App. Div. 1998); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

48. See RESTATEMENT (SECOND) § 139; see also *McIntosh v. Murphy*, 469 P.2d 177 (Haw. 1970) (in which the court enforced the validity of a one-year oral employment contract on the basis of which the plaintiff had relocated to Hawaii); *Hoffius v. Maestri*, 786 S.W.2d 846 (Ark. Ct. App. 1990) (a memorandum insufficient to satisfy statute of frauds requirements could still defeat a motion for summary judgment on the grounds of promissory estoppel); *Everett v. Brown*, 321 S.E.2d 685 (W. Va. 1984) (oral promise enforceable under promissory estoppel despite statute requiring a writing for commission agreements).

49. See Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983).

50. See Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL. L. REV. 63, 93 & nn.195-98 (1980-81) (citing cases in which promissory estoppel was applied in conjunction with 2-201).

51. See *Proliferation*, *supra* note 3, at 78; Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383 (1983).

tract law.⁵² Riding the wave of fairness, justice and “commercial reasonableness” rolling from the Code and the Restatement (Second), promissory estoppel seemed destined to sail on to ever greater triumphs in the remaining decades of the twentieth century. Trumpeting the fulfillment of his own rhetorical prophecy made a few pages earlier, Gilmore in *The Death of Contract* analyzed and compared the Restatement (Second’s) new versions of sections 75 [now 71] and 90 (including supporting commentary and illustrations), and declared a winner: “Clearly enough the unresolved ambiguity in the relationship between § 75 and § 90 in the Restatement (First) has now been resolved in favor of the promissory estoppel principle of § 90 which has, in effect, swallowed up the bargain principle of § 75.”⁵³

Maybe promissory estoppel was indeed “the most radical and expansive development of this century in the law of promissory liability.”⁵⁴

And maybe not.

C. The Postmodern Period

As the onset of the Reagan era brought “morning in America,” a lot of clocks were being reset—or, at least, a lot of pendulums began to swing back. The momentum of “modern” contract law visibly slowed, as accepted notions of “modern” contract jurisprudence were beset from left and right by new schools of theory, from Critical Legal Studies⁵⁵ to Law and Economics,⁵⁶ with Relational Contract somewhere in between.⁵⁷ The fruitful dialogue between bench, bar and

52. See Patrick S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193, 211-12 (1978); Charles L. Knapp, *The Promise of the Future and Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. 932-938 (1984).

53. GILMORE, *supra* note 7, at 72.

54. See *Proliferation*, *supra* note 3, at 53.

55. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1988 ANN. SURV. AM. L. 223; Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

56. See, e.g., CHARLES J. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* (1984); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2d ed. 1981); Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

57. See, e.g., Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); *Symposium, Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461.

classroom that had infused the Restatements and the U.C.C. with a variety of insights seemed during this period to have been replaced by a plethora of talk and a paucity of communication. And Reagan-era judges—often politically conservative, sometimes devotees of Chicago-School Economic Analysis—began to nudge contract back toward a kind of formalism that had seemed obsolescent only a decade or so ago.⁵⁸

As one of the star players on the modern contract law roster, promissory estoppel seemed to be in a batting slump of its own. Writing in 1990, Professor E. Allan Farnsworth observed that the failure of promissory estoppel to make headway in further overcoming the formal barriers to contract enforcement was “a surprise”—such a surprise, indeed, that it ranked for him among the “top 10 contract law developments of the 80s.”⁵⁹ Some recent articles have reported that promissory estoppel in the courtroom is indeed in a period of decline, sometimes discussed but seldom relied on as an actual basis for decision by American judges.⁶⁰

Another group of recent articles is generally unanimous on a related proposition: Despite the arguments of some academics and the holdings of a few courts, the Restatement (Second) suggestion that courts might limit promissory estoppel plaintiffs to reliance damages has been largely ignored. Expectation damages, these writers report, have been and remain the norm, not only for contract cases in general, but for promissory estoppel cases in particular.⁶¹ When plaintiffs in section 90 cases are limited to reliance damages, we are told, it is not because of doctrinal objections, but because some other limitation on damages applies, such as uncertainty, failure to mitigate, unforeseeability of consequential damages, etc.—all of which are limitations that would apply even if promissory estoppel were not the basis for relief.⁶²

58. See Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

59. E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 219-20 (1990).

60. See, e.g., Robert A. Hillman, *supra* note 43 (reporting that in the period under study (mid-1994 to mid-1996) promissory estoppel was seldom successful as a basis for recovery, and that appellate courts appear much more likely to reverse applications of promissory estoppel than refusals to apply it); Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263 (1994).

61. See Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903, 909 (1985); Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755; W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 202 (1990); Yorio & Thel, *supra* note 4, at 130 & n.120; but see Hillman, *supra* note 43.

62. See Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131.

That resolution of the reliance damages issue would not necessarily diminish the power of promissory estoppel. Indeed, it could be seen as strengthening that doctrine, supporting as it does the view that promissory estoppel is just as strong a basis for obligation as the conventional breach of contract claim.⁶³ Perhaps more important for the future of section 90 is the series of articles that have appeared since 1985 in which not just the damage issue but the whole concept of promissory estoppel has been reexamined. The next section of this article will examine this recent phenomenon, in an effort to compare and evaluate what these writers have to tell us about the place of promissory estoppel and reliance protection in American contract law.

II. Reliance in the Reviews

The wave of postmodern commentary on promissory estoppel—if not exactly a flood, at least a bubbling spring—is serious, scholarly, and complex. Any attempt to reduce it to a series of thumbnail sketches is surely incomplete, probably inaccurate and possibly unfair. These authors can speak for themselves, and indeed have done so. Nevertheless, for me to offer my own response to their work, I must necessarily attempt to describe and paraphrase it, so that you the reader may get a sense not necessarily of what they have in fact said, but of what I have heard.

From the title of this article, it might be assumed that the tone of recent commentary has been plainly hostile to promissory estoppel, or at least unfriendly. Generally, however, that is not the case; indeed, only one of the writers whose work I will discuss below, Michael Gibson, seems frankly unhappy with the sorts of results that courts are apt to reach with the aid of that doctrine. The two complementary pieces by Eric Mills Holmes are clearly as favorable to reliance protection as any partisan of promissory estoppel could wish, and most of the others could be regarded in some sense as friendly to promissory estoppel. As we shall see, however, the overall thrust of the recent criticism has been to reduce the role that reliance protection can or at least should play in contract law, by minimizing its importance as compared to other means of reaching (or rationalizing) decisions.

151-52 (1987).

63. See text at notes 158-62 *infra*.

A. Come Back, Shane: Reliance Retired

Appearing in 1985, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* by Professors Daniel A. Farber and John H. Matheson,⁶⁴ has good claim to be regarded as the genesis of the revisionist approach to promissory estoppel, and is probably still the most influential of this genre. Borrowing their catchy label from economist Arthur Okun,⁶⁵ Farber and Matheson advance the thesis that the role of reliance in promissory estoppel cases, whatever it may once have been, is now essentially ceremonial: a rhetorical third base that the court touches to legitimize a result that is in fact independent of—more specifically, oblivious to the absence of—the factor of reliance. In short, they assert, reliance-based recovery is no longer reliance-based.

Resting their conclusions on a ten-year survey of promissory estoppel cases, Farber and Matheson (to whom I will refer henceforth, with what I hope is pardonable informality, as F & M) assert that the results of the decided cases are simply not congruent with the reliance factor. Recovery, they report, is often denied even though reliance is present; more important to their thesis, it is often granted in the name of promissory estoppel even when reliance is absent.⁶⁶ This in turn suggests to F & M a fundamental reexamination of what this sort of recovery is really about, and they provide one, complete with a suggested Restatement (Third) provision to define it.⁶⁷

Addressed apparently to the period from 1975-85, the F & M survey of cases appears not to have turned up a noteworthy decline in the employment of promissory estoppel. Indeed, they report among their findings that the doctrine is regularly applied in a wide variety of commercial contexts.⁶⁸ Nor, they continue, is promissory estoppel necessarily remitted to the status of a "fall-back" theory of recovery, not to be even considered unless conventional contract analysis fails the plaintiff; rather, as of 1985 at least, courts "are now comfortable enough with the doctrine to use it as a primary basis for enforcement."⁶⁹ Their survey also supported the conclusion—independently reached by other investigators—that reliance plaintiffs are usually not limited to reliance damages. Despite theoretical arguments to the contrary and a gentle nudge from the Restatement (Second), courts

64. Farber & Matheson, *supra* note 61.

65. *See id.* at 903.

66. In Part III of this article we will further address these two propositions.

67. *See* Farber & Matheson, *supra* note 61, at 930.

68. *See id.* at 907.

69. *Id.* at 908.

in promissory estoppel cases routinely award full expectation damages (including in some cases substantial lost profits), as well as specific relief when appropriate.⁷⁰

The most important (and, they suggest, the most surprising) finding reported by F & M is the extent to which recovery overtly based on "promissory estoppel" is granted in cases where there appears to have been in fact little, if anything, that one could call "substantial reliance."⁷¹ Frequently, they assert, courts "strain" to find something they can call reliance, in order to justify recovery apparently actuated by something else. Sometimes there has been a change of position by the plaintiff, but not one that appears particularly detrimental; sometimes the parties appear to have actually had an agreement that could have passed the bargained-for-exchange test, but the court applies Restatement (Second) section 90 instead.⁷²

Attempting to explain this phenomenon, F & M suggest three factors that appear common to these cases of dubious reliance: (1) The defendant did indeed make a "credible promise" (i.e. a "binding commitment" as opposed to "opinions, predictions or negotiations"); (2) the promising party did have authority to make that promise;⁷³ (3) because the promise was made in the furtherance of some economic activity of the defendant, there was in the circumstances of the case some prospective benefit to the promisor.⁷⁴

Drawing these conclusions together, F & M proceed to suggest a unifying principle suitable for inclusion in a sometime Restatement (Third) of Contracts:

§ 71. Enforceability of Promises

A promise is enforceable when made in furtherance of an economic activity.⁷⁵

In time-honored restatement fashion, this proposed rule is accompanied by elaborating commentary and several illustrations.⁷⁶ As thus explained, the rule would apparently cover most if not all promises made by a corporation or other business enterprise, such as a partnership, limited partnership, joint venture, etc. Since all business organizations have as their ultimate end the making of a profit, it might well be argued that such entities never make any commitment

70. *See id.* at 909-10.

71. *Id.* at 910.

72. *See id.* at 910-14.

73. This of course is an "agency" question, not a "contracts" one, but in the commercial realm most actors are corporations or at least multi-person organizations, so issues of agency and authority are often raised.

74. *See* Farber & Matheson, *supra* note 61, 914-24.

75. *Id.* at 930.

76. *See id.* at 930-34.

which is not "in furtherance of" economic activity.⁷⁷ (Whether or not a profit is actually earned should not be the issue; we assume that every action is at least directed—even if misguided—toward a profit-making end.) If the promisor is a business organization, then, the harder questions will be whether a sufficient commitment was actually expressed,⁷⁸ by a person who had sufficient authority to bind the organization⁷⁹ by her words or actions.⁸⁰

F & M clearly intend that a promise by an individual will fall within this rule as well, if made in furtherance of that individual's economic activity.⁸¹ Thus, promises made by individual proprietors in the operation of their businesses would be covered, including promises made by individual employers to their employees. Presumably promises made by employees to their employers could also be en-

77. F & M also indicate that the term "economic activity" is to include the operations of organized charities, although the significance of this is not clear. Since the promises made by charitable organizations as part of bargained-for exchanges are already enforceable as ordinary contracts, F & M may merely have wanted to stress the possibility that promises incidental to such exchange activity would be enforceable under their scheme when made by organized charities just as they would be when made by business corporations. Conceivably they could also be suggesting—wittingly or not—that when an organized charity makes a *donative* promise, that promise should be deemed made in the course of its "economic activity," and should therefore be enforceable without the need for a showing of either consideration or reliance. Since organized charities obviously do make many "donative" transfers, to make their promises of such transfers enforceable *per se* would be a not insignificant policy decision.

Donative promises made to organized charities by *non-charitable* promisors would probably also be enforceable under the F & M scheme. If made by a business organization, such a promise would be regarded as made in the course of the promisor's business activity. (Corporate theory allows such donations as potentially permissible exercises of the business judgment of the corporation's directors. See *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953).) When made by an individual, such promises would probably not be covered by the "economic activity" rule, but they already are usually enforceable on some basis: consideration, reliance, or public policy. See RESTATEMENT (SECOND) § 90, Comment; Mary Frances Budig et al., *Pledges to Non-Profit Organizations: Are They Enforceable and Must They be Enforced?* (1993) at 3 (Program on Philanthropy and the Law, N.Y.U. Law School), also published at 27 U.S.F. L. REV. 47 (1992).

78. F & M comment c indicates the continued pertinence here of the distinction between a true commitment and a "statement of opinion" or "mere prediction of future events." Farber & Matheson, *supra* note 61, at 933.

79. Such authority may, of course, under established agency principles be either actual or apparent; the principal might also bind itself by a later affirmation or ratification of an originally unauthorized commitment. See *id.* at 935 cmt. d. See generally RESTATEMENT (SECOND) OF AGENCY §§ 26, 27, 82, 83, 103, 104 (1957).

80. F & M indicate clearly their intention to preserve the existing range of promissory activity under the Restatement (Second), including express terms both written and oral, as well as circumstances such as course of performance, course of dealing and usage of trade. See Farber & Matheson, *supra* note 61, at 934 cmt. d.

81. See *id.* at 930 cmt. a.

forceable under this rule, although this result is not spelled out.⁸² Some intra-family promises surely could be regarded as having been made in the course of economic activity, and thus enforceable under this section. Most intra-family promises, however, probably would not be enforceable.⁸³

As thus explained, the "economic activity" rule for promise-enforcement would substantially shift contract doctrine toward greater enforcement of promises. Where the promissory liability of a business enterprise is concerned, "consideration" (at least as defined by the first and second Restatements) would be out the window. A "bargained-for exchange" would no longer be required. Whether adoption of the rule would make a significant difference in practice, in terms of the outcomes of decided cases, is another question. F & M support their argument principally on the basis of the already decided cases, so it might be thought that little or no change in results would follow, merely some shift in the way in which courts explain or rationalize their decisions.⁸⁴ That may underestimate, however, the degree to which timid or unimaginative courts might thus be encouraged to do what they have hitherto felt constrained in doing. (The original section 90 seems to have had that effect.) And any shift in doctrine which strengthens the plausibility—if not the inevitability—of a pro-plaintiff outcome may, in the real world of litigation, increase the likelihood of a settlement favorable to the plaintiff where a slimmer settlement, or none at all, would have been forthcoming before.

It should also be recalled that even in their advocacy of this doctrinal shift, F & M do not brush aside the very real difficulties the plaintiff may encounter in proving either that a sufficient commitment was made at all, or that it was made on behalf of the defendant by someone authorized to do so.⁸⁵ Even if a lack-of-consideration defense were precluded by the "economic activity" rule, most business

82. F & M give four illustrations of promises made by employers, one of which is specifically a corporation and one a "large department store chain." See *id.* at 931-34. There are no illustrations involving promisor/employees, however. For many individual employees, their job is their only "economic activity," so logically their promises should be covered, too. On the other hand, since the balance of power is usually thought to favor employers over individual employees, one might at least hesitate before strengthening the employer's bargaining position in this respect.

83. F & M give, as an example of an individual commitment *not* enforceable under this rule, an agreement between ex-spouses modifying an existing separation agreement, because not made "in furtherance of an economic activity." *Id.* at 932. Presumably this could come as news to, *inter alia*, Donald and Ivana Trump.

84. F & M report that many cases are decided for the plaintiff on promissory estoppel grounds even though they could with little or no strain have been fitted into the bargained-for consideration mold. See *id.* at 908.

85. See *id.* at 914-20.

enterprises by their nature are particularly well situated to invoke these other defenses. They act through multiple agents, often with different spheres of authority, who may speak inconsistently about the transaction at issue. When standardized forms or other "fine print" or "boilerplate" writings are employed, an organization may by words and actions create the appearance of commitment while simultaneously denying (in its forms) that any such commitment is intended. Moreover, a business organization with substantial market power will often have the power to invoke or not invoke formalities as it chooses—to impose on the other party its election whether to express the entire agreement formally in writing, or to express some or all of it either in informal writing or in no writing at all.

Besides asserting that their proposed rule does indeed harmonize otherwise inexplicable results, F & M attempt to justify it in a variety of ways. They argue that the rule may not be dependent on a showing of reliance, but it will in practice protect promisees in situations where reliance is likely to exist in fact, but would be difficult or impossible to prove. Moreover, they argue, the proposed rule is also efficient: By providing a clearer rule for enforcement, it will deter rash promises and encourage actors to be candid about their true intentions, in order to avoid the appearance of commitment where no real commitment is intended. Not only that, but by shoring up society's interest in the general reliability of trust-invoking activity, the proposed rule is responsive (albeit in an economically realistic way) to communitarian concerns. Maybe it doesn't go as far as others might wish in the direction of promise-enforcement, they conclude, but the proposed rule does provide firmer and more useful guidance to the courts in deciding whether to enforce possibly unrelieved-on promises.⁸⁶

In the course of their discussion of the proposed new rule, F & M provide a stirring exposition of its policy underpinning, which deserves quotation at length:

[T]he cases in which courts have pushed the doctrine of promissory estoppel beyond its stated justification and technical limitations are characterized by a strong need both by the parties and society for a high level of trust. They involve relationships in which one party must depend on the word of the other to engage in socially beneficial reliance. . . . The point in these cases is not that reliance has taken place in a particular instance, but rather that reliance should be encouraged among participants in a class of activities. To restate our initial observation, the role of reliance in establishing liability and determining damages in *individual cases* is on the decline—but reliance, in the form of trust, is on the rise as the *policy* behind legal

86. See *id.* at 934-38.

rules of promissory obligation.⁸⁷

In an article of relatively modest length, F and M have accomplished a great deal, combining careful analysis of what courts have already done with a useful suggestion of what courts and commentators might do in the future to build on that foundation. In light of their substantial and generally admirable achievement, to cavil seems churlish. Nevertheless, in our particular context, F & M have taken a long step toward the marginalization of promissory estoppel.

The question is one of perspective. Viewed as an examination of the role of "promissory estoppel," the F & M account is, in one sense, enthusiastic. Look at all the good decisions that have been made in the name of promissory estoppel, they seem to be saying. Seen as a discourse on the role of reliance, their story is quite different: Reliance doesn't matter any more (or at least not very much). Viewed closely, however, their story really isn't about either the expansion of promissory estoppel or the withering away of reliance; it's about the gradual reform of consideration.

If consideration, in the form of bargained-for exchange, requires an explicit price for each promise, a *quid pro quo*, then many promises made in the context of economic activity will not be seen as consideration-supported. As F & M rightly point out, many promises made in a commercial context do not meet that test, even if they do appear to express the promisor's genuine commitment to performance. But such promises are likely to have been seriously intended, in any event are likely to be reasonably regarded as expressing a reliable intention to perform, and thus are likely to generate substantial reliance (some of which might be easily proven and some not). And they play a part in some ongoing transaction—either contemplated or already in progress—which has as its ultimate goal the successful conduct of the promisor's profit-seeking activity. One need only to slightly relax the definition of a "bargain" to regard this sort of promise as consideration-based.

The new rule proposed by F & M for a future Restatement is thus not a revised rule of promissory estoppel at all, as they in effect concede, by numbering it not with promissory estoppel's well-known section 90, but as section 71, to replace the Restatement (Second) definition of consideration as bargained-for exchange.⁸⁸ What promissory estoppel has really done for contract law, F & M turn out to be saying, is to give the courts a vehicle with which to effect their own silent revision of the consideration requirement, a looser and more

87. *Id.* at 928-29 (emphasis in original).

88. *See id.* at 930 n.99 ("proposed rule covers the vast majority of situations previously handled by the doctrine of consideration").

realistic version than its present expression in the Restatement (Second). It has become possible, F & M declare, to revise the definition of consideration to encompass all economically generated commitments. Once brought within the ambit of consideration, such promises need no additional bolstering by reliance-in-fact; the mere probability of reliance is enough to justify their enforcement, as it traditionally is for any consideration-supported promise.

Strengthening that conclusion is the F & M observation that the presence of economic activity introduces the element of potential benefit (at least ultimately) to the promisor.⁸⁹ Although benefit to the promisor is not one of the stated section 90 requirements for promissory estoppel, it does serve to make the promise credible, and therefore to make reliance reasonable, as they point out. To the extent that the promisor may in fact have benefited from the promisee's reliance, that factor can also strengthen the conclusion that injustice would flow from nonenforcement. But "benefit to the promisor" in this context has symbolic value as well. Before being elbowed out of the way by "bargained-for exchange," benefit to the promisor (along with "detriment to the promisee") was one of the two touchstones of consideration.⁹⁰

In fairness to F & M, they nowhere assert that their proposed new definition of consideration is a comprehensive summation of the law of promissory enforcement. No "single legal rule," they freely admit, "can begin to capture the full spectrum of social relations."⁹¹ If, as they suggest, section 71 is the particular rule to be redesigned, then section 90 is presumably still out there somewhere, doing its own thing. But given their professed purpose—to "investigate the current evolution of promissory estoppel,"⁹² perhaps even to find "the key" to that doctrine⁹³—it is difficult to avoid the implication in the F & M account that because promissory estoppel is "losing its link with reliance,"⁹⁴ reliance must therefore be shrinking in importance. In fact, however, what they report is not a shrinking in the importance of reliance, but a shrinking in the importance of "bargained-for exchange." Under the camouflage of reliance-protection, the exchange test for consideration has been substantially relaxed—"modernized," if you will.

89. See *id.* at 930-31 ("requirement that the promise be 'in furtherance' of the economic activity carries the implication that the promisor must expect a benefit to result from the promise").

90. See *supra* notes 15-17 and accompanying text.

91. Farber & Matheson, *supra* note 61, at 938.

92. *Id.* at 907.

93. *Id.* at 904.

94. *Id.* at 945.

As F & M tell the story, it might be thought that the section 90 version of promissory estoppel has completely performed its most important function, by spearheading a successful movement for the reform of consideration. If so, and the F & M reformulation of the consideration requirement finds general favor, what then? Having tamed the bad guys, and brought civilization to the wilderness, should promissory estoppel holster its gun, murmur "Guess my work here is done," and, like Shane, ride off into the sunset? If not, can it find useful work to do in a town where the same guys—reformed or not—appear to be still in charge?

B. Give Me Your Tired, Your Poor: Reliance Reassigned

Two years after F and M had put promissory estoppel in play, so to speak, Professor Juliet Kostritsky addressed the subject, with results that generally squared with the F & M analysis, while going beyond theirs in significant respects. In her 1987 article, entitled *A New Theory of Assent-Based Liability Emerging under the Guise of Promissory Estoppel: An Explanation and Defense*,⁹⁵ Kostritsky advances the thesis that promissory estoppel can best be understood, not as a ground of recovery independent of bargain-enforcement, but rather as a subsidiary means of identifying bargains deserving of enforcement. Supported by extensive analysis of decided cases, she argues that promissory estoppel claims tend predictably to succeed in particular situations, situations which she identifies (acknowledging the presence of substantial overlap) as follows: (1) cases where the parties are of different status, or for other reasons have different degrees of knowledge about the subject of their dealings; (2) cases involving parties who are already "enmeshed" in some broader relationship; and (3) cases where a relationship of trust and confidence already exists between the parties. Although these elements have frequently been visible in promissory estoppel cases, they have not been formally identified as integral to a promissory estoppel recovery; nevertheless, she argues, they should be so recognized, because they explain and rationalize the role that promissory estoppel has in fact played in contract law.⁹⁶

In Kostritsky's analysis, the role of contract law is not reliance protection, it is bargain enforcement. The various situations she identifies as conducive to promissory estoppel recovery are all, she ex-

95. Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987).

96. See *id.* at 906.

plains, situations in which there are “persuasive barriers to, or explanations for the parties dispensing with, explicitly reciprocal or formalized contracting.”⁹⁷ Parties operating with an equality of bargaining power, with an equal and sufficient amount of expertise, and at arm’s length, can readily fit their transactions into the mold of a formal bargain, which conventional contract law will enforce. Parties operating with unequal status or knowledge, already involved in some sort of joint endeavor, or situated in a confidential relationship, are less likely to employ the conventional means to formalize their transaction.⁹⁸ Thus, Kostritsky argues, promissory estoppel has served well—and should continue to serve—as an adjunct to bargain theory, to help courts identify bargainers who deserve the law’s assistance, but—for excusable reasons—lack the formal credentials that conventional contract law demands.

These “barriers to bargain,” Kostritsky concedes, do not completely account for the promissory estoppel case law. While specifically emphasized in some decisions, and obviously present in many others, they do not explain the cases in which relatively equal parties—equal in economic status and in sophistication—have been allowed to recover. To account for this residual category, Kostritsky adds another element: The presence of at least a “plausible” benefit to the promisor. In many cases, she asserts, the promisee’s reliance, while not explicitly bargained for as the “price” of the promise, was likely to have been both desired by the promisor and beneficial to her (or so it may appear from the available facts).⁹⁹ This presence of a benefit to the promisor not only accounts for the residual cases, it strengthens the result in the “barriers to formal bargain” cases as well, because it serves as an indicium of the underlying *sine qua non* of “assent-based” obligation: The presence, on the part of the promisor, of an intent to be bound.¹⁰⁰

Kostritsky’s work to some extent echoes the views of F & M in its emphasis on “benefit to the promisor” as an element in the promisee’s recovery. Her article is distinctive, however, in its emphasis on the central role of the so-called “barriers to bargain” that she identifies. And her account of promissory estoppel as a means of compensating for such barriers is well-documented, and persuasive. As she asserts, her analysis is based on a real-world perception of how and

97. *Id.* at 905.

98. Cf. Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859 (1996) (asserting that businesses in ongoing relationships will not utilize writings to the extent that strangers will).

99. See Kostritsky, *supra* note 95, at 943-47.

100. See *id.* at 947.

why people behave, suggesting a host of reasons why they do or do not resort to formal bargain in their dealings with each other. And her identification of those factors in the decided cases jibes with the hunch many of us have long had that judges are indeed affected and influenced by those factors, even where the rules do not specifically invite them to be.¹⁰¹ Kostritsky certainly isn't arguing that promissory estoppel should be shut out of the game entirely; helping contract law to adjust for these "barriers to bargain" is an important position for promissory estoppel to play. So what peril do her views possibly hold for the notion of reliance protection?

To the extent that Kostritsky's observations stress the promisor's intention to be legally bound, they substantially reflect the "assent-based" approach of Professors Barnett and Becker, to be discussed immediately below, and what is said about their work will be applicable to hers as well.¹⁰² Beyond that, if there is a particular problem with Kostritsky's analysis, it seems to me to lie with her vision of promissory estoppel as a sort of doctrinal doorman, admitting to the feast of bargainers those guests who have a good explanation for their failure to arrive with an engraved formal invitation. As will be discussed below, the core of promissory estoppel seems to me to be not merely the absence of formal bargain, but the damage caused by one party's trust in the other's sincerity of intention, when that trust is betrayed after reliance has occurred. Kostritsky's "barriers to bargain" analysis does describe a large number of the cases where this combination of trust and betrayal can be seen, but as she herself concedes, it doesn't account for all of them.¹⁰³ In the end, the difference may be merely one of emphasis: Should promissory estoppel be viewed as a sort of "Special Contracts" program, designed for the doctrinally challenged? Or does it also have a larger role to play, and if so, what is that role, and how does it relate to the larger body of contract law?

C. Promises, Promises: Reliance Restricted

In an article appearing on the heels of Professor Kostritsky's piece discussed above, Professors Randy Barnett and Mary Becker further pursue the elusive question: What is promissory estoppel really like? Their discussion, entitled *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*,¹⁰⁴ is reminis-

101. See, e.g., *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

102. See *infra* part II(C).

103. See Kostritsky, *supra* note 95, at 907, n.30.

104. Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

cent of the F & M article, not merely in its title but in its conclusions; nevertheless, it makes some distinct points of its own. To the extent that it discusses the issue of damages in promissory estoppel cases, *Beyond Reliance* reflects Becker's separate discussion of that issue. She reaches the conclusion that whatever the commentators or the Restatement (Second) may think, the courts consistently award expectation remedies in promissory estoppel cases, where that can be done consistent with the ordinary limitations on contract damage—certainty, foreseeability, and the like.¹⁰⁵ And *Beyond Reliance* also can be seen as one of a series of articles in which Barnett advances his reconstruction of contract law as dependent throughout, in one way or another, on the factor of consent to be legally bound.¹⁰⁶

In *Beyond Reliance*, Barnett and Becker (together, B & B) respond to one of the over-arching themes of Gilmore's *Death of Contract*—that contract is gradually being absorbed into tort, and that promissory estoppel's expansion is symptomatic of that process.¹⁰⁷ Relying, like F & M and Kostritsky, on their own survey of the decided cases, B & B divide the promissory estoppel decisions into two groups. One group, much the larger, belongs on the contract side;¹⁰⁸ the other group of cases—smaller, but still of importance—can and should be better understood as a subset of tort law.¹⁰⁹

As to the first, larger category, B & B begin with the conventional opening gambit of contract theory: What promises are to be enforced? Apparently accepting the F & M survey, which indicated the relative unimportance of reliance in the promissory estoppel area, B & B argue that what matters most in such cases is the nature of the commitment that the promisor has made. In their eyes, the various formal requirements that attend contract formation are all in one way or another attempts to answer the same question: Did the promisor intend to be legally bound by the commitment expressed? Formal requirements like the statute of frauds address that question most directly, by using form as a marker for seriousness of intention.¹¹⁰ The

105. See Becker, *supra* note 62.

106. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POLICY 179 (1986). Professor Barnett's more recent article, *The Death of Reliance*, 46 J. LEG. EDUC. 518 (1996), is also concerned primarily with promissory estoppel. It necessarily repeats much of the analysis in his article written with Professor Becker, but also surveys the intervening literature and adds further analysis of his own. It is discussed below. See *infra* notes 204-48 and accompanying text.

107. GILMORE, *supra* note 7, at 87-94.

108. Barnett & Becker, *supra* note 104, at 449 *et seq.*

109. See *id.* at 485-95.

110. See *id.* at 450.

conventional consideration requirement of a bargained-for exchange can also, they suggest, be seen as a kind of formal requirement. The presence of the element of bargain-in-substance helps to ensure the serious intention of the promising party. Conversely, any party intending to be bound and aware of that conventional rule can fit the contemplated transaction into a bargain mold, thereby invoking the "form" of consideration to achieve the desired result.¹¹¹ In many promissory estoppel cases, the promise is made in an informal setting, but it nevertheless appears likely that the promisor did intend to be bound; in such cases promissory estoppel may serve as a convenient vehicle for enforcement.¹¹²

In the course of their discussion, B & B examine at length a variety of situations in which promissory estoppel has been successfully invoked. Where a promise is made in a non-commercial setting—a promise to a charity, or an intra-family promise—it may well be made with sufficient formality to evidence the promisor's intention to be bound. In the case of promises made to charities, courts have commonly striven to find bases for enforcement. Both promissory estoppel and consideration have been pressed into service in this effort—not always comfortably. Intra-family promises may also be made in circumstances of relative formality, with reliance a foreseeable result; these factors combine to make enforcement appropriate.¹¹³

Many "gratuitous" promises are made in commercial settings, however, including "firm" offers, promises of modifications or waivers, and other "assurances" given in a business context. In such cases, B & B declare, we can generally be confident of the intent to be legally bound, and so we need pay little attention to reliance. And, they point out (here echoing the F & M survey), that is just what courts in fact are doing.¹¹⁴ Where enforcement of the promise runs afoul of some requirement of "form"—a statute of frauds, the parol evidence rule, the requirement of definiteness, etc.—some demonstrated reliance may be necessary to enable promissory estoppel to trump the formal requirement. In many cases that reliance will in fact have been bargained for (a consideration-supported bargain was present, but subject to a formal barrier). In other cases unbargained-for reliance may strengthen the likelihood that the asserted promise was in fact made.¹¹⁵

Turning to the tort side of the ledger, B & B contend that some

111. *See id.* at 450-51.

112. *See id.* at 449.

113. *See id.* at 451-55.

114. *See id.* at 455-70.

115. *See id.* at 470-85.

decisions bottomed on promissory estoppel do not in fact fall within the domain of contract at all. Using as examples some well-known cases,¹¹⁶ they suggest the category of "negligent promissory misrepresentation" to explain cases in which the promisees were induced to rely on promissory representations made recklessly or negligently, without serious intention to perform. In these cases the promisor knows (or should know) that the promisee will regard the promise as more reliable than it was in fact intended to be.¹¹⁷

As noted above, the B & B treatment of promissory estoppel is for both authors part of a more extended discussion. In Becker's case, the discussion is about the remedies which will be available for promissory estoppel; in Barnett's, it is about the true nature of promissory liability. As to the former, Becker seems to be in good company with her assertion that expectation remedies are routinely awarded in promissory estoppel cases, "reliance-based" obligation or not.¹¹⁸ As to the latter, however, more must be said.

Barnett's central thesis is that contract law can be generally explained on the basis of consent.¹¹⁹ This does not merely mean that agreements are voluntarily entered into, so that contract law, unlike tort, enforces standards of conduct that have been voluntarily assumed. Barnett goes farther, to assert that contractual liability is—and should be—imposed only against parties who have expressed their consent to be legally bound. As an argument for the imposition of liability based on formally expressed promises, Barnett's story makes sense. Promises made in a formal manner are likely to be legally binding (and may well be viewed as probably legally binding, even when they would not be), and so the making of such a promise is likely to evidence the intention to make a legal commitment. Moreover, when a promise appears to have been made with the intent to be legally bound, the promisee is likely to rely in a variety of ways, provable and unprovable. The intention to be bound and the likelihood of reliance go hand in hand, and enforcement of such promises can satisfy both those who focus on the importance of consent and those who seek fully to protect foreseeable reliance.

But in their discussion of promissory estoppel, B & B make two related assertions that appear to me to be, if not aimed directly at the heart of promissory estoppel, at least likely to do it serious bodily harm. One is that the potentially enforceable promise—here as else-

116. See, e.g., *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948); *Hoffman v. Red Owl Stores*, 133 N.W.2d 267 (Wis. 1965).

117. See Barnett & Becker, *supra* note 104, at 485-95.

118. See Kelly, *supra* note 61; Slawson, *supra* note 61; but see Hillman, *supra* note 43.

119. See *supra* note 106.

where—must be a promise that the promisor intended to be legally binding. We may identify it in a variety of ways, but the underlying essence is the same: The promisor apparently intended to be legally bound.¹²⁰ The other assertion is that the reasonableness of reliance on a promise will necessarily turn on its legal enforceability.¹²¹

The first assertion is (as Barnett realizes) over-inclusive in terms of present doctrine. More importantly, it is also under-inclusive, in terms of reliance protection. Frequently, of course, it will appear that a promisor did in fact intend to be legally bound. Many well-known promissory estoppel cases, where the promisor died and some successor in interest resisted enforcement, fall into this category.¹²² And in other cases it may appear that the promisee reasonably believed the promisor to have had such an intention, even if that belief may have been erroneous. But the fallacy of the B & B conceptual scheme is the apparent assumption that there is no middle ground between the promise meant to be legally binding and the promise meant to have no force whatever. In the real world, however, probably millions or even billions of such middle-level promises are made every day. These are promises made without any conscious intention one way or the other as to their legal enforceability, but made with the apparent serious intention that they will be performed. If performance is in fact intended when the promise is made, then the promisor at that time may well have no particular thought about legal enforceability one way or the other, because no question of legal enforcement seems likely to arise. Such promises may or may not be enforceable under reliance principles; they should not be per se unenforceable merely for lack of explicit intent to be bound.

The second assertion referred to above also appears in the B & B account, although it is not stressed, or developed at length. It occurs in the course of a discussion of the traditional test for promissory estoppel, a test which B & B dismiss as “too circular to have descriptive or predictive power.”¹²³ “[H]ow,” they ask, “can enforcement turn on the reasonableness of reliance when the reasonableness of reliance will necessarily depend on enforceability?”¹²⁴

If pressed to its ultimate conclusion, this position has serious negative consequences for promissory estoppel. If reliance is only reasonable when the promise relied on is in fact enforceable for some reason other than promissory estoppel, then promissory estoppel has

120. See, e.g., Barnett & Becker, *supra* note 104, at 451, 485.

121. See *id.* at 446-47.

122. See, e.g., Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898).

123. Barnett & Becker, *supra* note 104, at 446.

124. *Id.* at 446-47.

no independent legal existence at all. That argument proves too much. Perhaps B & B mean that reliance can only be reasonable when the promisee reasonably but mistakenly believes the promise to be enforceable. In that case, promissory estoppel would still have a role to play, but a narrow one. Successful promissory estoppel cases would only be those where promisee could reasonably have been unaware of the rule that would otherwise preclude enforceability—either because the rule itself is obscure or counter-intuitive, or because the promisee was particularly unsophisticated about legal matters.¹²⁵

But just as most promises are probably made without regard to their legal enforceability, so does much reliance take place in the same spirit. If the promisor apparently intends to perform, and the promisee relies substantially on that intention, is the reliance that follows necessarily unreasonable merely because it took no account of the promisor's intention to be (or not to be) legally bound? To so assert is simply to ignore the reality of daily life. We constantly trust others to do what they commit themselves to do, not because we think the law would compel them to, but because it doesn't occur to us that the law might have to. We expect performance because a commitment has been made, by someone whom we trust to keep her word.

In trying to apply the traditional test for promissory estoppel, as enunciated in Restatement (Second) section 90, the hard issue is not whether one can reasonably rely on an apparently seriously intended promise without actually thinking about its legal enforceability. Unless the vast majority of humankind is persistently unreasonable, clearly one can—because everyone does. So reliance without regard to enforceability can hardly be per se unreasonable. A harder question is whether reliance on a promise can ever be reasonable when the relying promisee does in fact have conscious doubts about its enforceability (or perhaps merely has reason to doubt). Here it appears to me that reasonable people could differ—which would mean that some reasonable people could say yes, at least sometimes, it can. After all, each one of us does in fact rely daily in innumerable ways on commitments made to us, the enforceability of which we would, if pressed, have to concede to be doubtful at best.¹²⁶

The hardest question of all, however—the truly “indeterminate” aspect of the section 90 rule—is the question of “injustice.” Even if reliance was foreseeable or indeed foreseen, and even if that reliance was reasonable, does justice demand that the cost of that reliance be

125. Here Kostitsky's discussion of “barriers to bargain” is apropos. See *supra* notes 97-103 and accompanying text.

126. This is particularly true of those of us who have had legal training.

shifted to the promisor? Here the B & B analysis can supply part of the answer: An apparent intention on the promisor's part to be legally bound could certainly help to answer that question in the affirmative. But, B & B analysis to the contrary notwithstanding, intention to be bound should not be the only issue, nor necessarily the decisive one. In a later article, Barnett further examined reliance's role in promissory enforcement, and suggested some rules of his own; we will consider them at a later point below.¹²⁷

D. Back to the Future: Reliance Rejected

By 1980, a substantial body of case law had developed addressing the extent to which promissory estoppel could and should be employed by courts in cases involving sales of goods, cases which would nearly everywhere be governed directly by Article 2 of the U.C.C. The Code in general, and Article 2 in particular, is well known to be the brainchild of Karl Llewellyn, who drafted Article 2 initially and shepherded it through many drafts until its ultimate promulgation as a Uniform Act. With its strong emphasis on good faith and commercial reasonableness as potentially enforceable standards of behavior and on course of performance, course of dealing and usage of trade as sources of agreement, "Karl's New Kode" was not only widely adopted by the states, but generally regarded as the voice of "modern" commercial law, with at least an "analogical" impact on contract law at large.¹²⁸

Llewellyn had written extensively about the shortcomings of classical contract law, and many portions of Article 2 are attempts within the sales area to remedy what he saw as the defects of consideration theory; defects which imposed an undue formalism on the formation of commercial agreements.¹²⁹ The "firm offer" section,¹³⁰ the negation of any consideration requirement for modifications,¹³¹ the liberalized statute of frauds,¹³² and the somewhat "Corbinized" parol evidence rule¹³³ all bespeak Llewellyn's effort to free business from what he regarded as the excessive formalism of Willistonian

127. See *infra* part II(G).

128. For a discussion of the effects of the Code on contract law *in toto*, see Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of our New Commercial Law*, 11 VILL. L. REV. 213 (1966).

129. See, e.g., Karl Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance, I.*, 48 YALE L.J. 1, 14-17, 32 (1938).

130. U.C.C. § 2-205 (1995).

131. See U.C.C. § 2-209(1) (1995).

132. See U.C.C. § 2-201 (1995).

133. See U.C.C. § 2-202 (1995).

contract law.¹³⁴

At the same time, however, the common law on its own hook was also moving away from those earlier positions, often with the aid of promissory estoppel theory. With his famous opinion in *Drennan v. Star Paving Co.*,¹³⁵ Justice Roger Traynor had shown the way to a kind of "firm offer" enforcement not dependent on consideration. This position became clearly preponderant at least in "subcontractor bidding" cases. In a series of leading decisions, not only California, but other states as well had moved beyond the tentative position of the Restatement (First) to a much more expansive application of promissory estoppel in statute of frauds cases.¹³⁶ And the "pre-existing duty" rule was often relaxed, particularly in cases where "one-sided" modifications were enforced in favor of parties who had in good faith relied in a substantial way on the defendant's apparently genuine agreement to a change in terms.¹³⁷ It would seem that during this period the Code and the common law were proceeding, if not in tandem, at least in complementary fashion, in rebuilding the structure of contract law.

Thus, it probably seemed natural to many that the *Drennan* rule was often applied in situations involving goods, or that the Article 2 statute of frauds, U.C.C. section 2-201, also began to bend to demonstrated reliance. Commentators noted these developments, generally with approval, and in one of a series of notable articles, Michael Metzger and Michael Phillips strongly argued that the employment of promissory estoppel to overcome the statutory bar of section 2-201 was both substantively and doctrinally appropriate.¹³⁸ Many of the courts which had so far addressed the point appeared to agree.¹³⁹

Seen through the rear-view mirror, the Metzger and Phillips articles appear to have been the last hurrah of the "modern" approbation for promissory estoppel. The 1988 article by Professor Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement*

134. See, e.g., Karl Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 355-80 (1937).

135. 333 P.2d 757 (Cal. 1958).

136. See RESTATEMENT (FIRST) § 178 cmt. f; see also *Monarco v. Lo Greco*, 220 P.2d 737 (Cal. 1950); *Seymour v. Oelrichs*, 122 P. 847 (Cal. 1912); *McIntosh v. Murphy*, 469 P.2d 177 (Haw. 1970); *Alpark Distrib., Inc. v. Poole*, 600 P.2d 229 (Nev. 1979).

137. See, e.g., *Finly v. Aetna Life & Cas. Co.*, 499 A.2d 64 (Conn. App. Ct. 1985); *Farm Crop Energy v. Old Nat'l Bank*, 685 P.2d 1097 (Wash. Ct. App. 1984).

138. See Metzger & Phillips, *supra* note 50.

139. See *id.* at 104 n.274. Other articles by Metzger and/or Phillips include *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139 (1980); *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, *supra* note 49; *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, *supra* note 51.

(*Third*) of Contracts,¹⁴⁰ while not the first of the new wave of revisionist commentary, is the most harshly critical of the whole notion of reliance-protection in the area of commercial contracting. In his voluminous and scholarly discussion, Professor Gibson maintains that Karl Llewellyn himself strongly felt that the presence of reliance—or at least the proof of its presence or absence—should play little or no part in the enforcement of commercial agreements generally.

With the support of chapter and verse from the “legislative history” of Article 2—early drafts, committee hearings, letters, and memoranda to and from Llewellyn and his contemporaries—Gibson argues vigorously that Llewellyn personally rejected and resisted any incorporation of promissory estoppel principles in the Code. Llewellyn’s objections, Gibson reports, were principally these: a) Every commercial transaction generates reliance early on, often before an agreement has actually been reached. The presence of such reliance, while a “tacit presupposition,” is not by itself a sufficient basis for enforcement. b) Proof of reliance—particularly if “passive”—is apt to be difficult. To make the enforcement decision turn on such proof would be “administratively baffling.” c) Reliance-based protection is a one-way street; as applied in the “firm offer” situation—a la *Drennan*—it binds only the offeror, and not the offeree. d) Enforcement based on reliance could become enforcement even in the absence of true agreement. In contrast, enforcement based on agreement—but a true agreement, freed of the technical constraints of consideration and its corollaries—provides as much protection as is appropriate for reliance-in-fact. And such agreement-based enforcement will protect not only “overt, easily-proved reliance” but “subtle or passive” reliance as well.¹⁴¹

Having established to his own satisfaction Llewellyn’s jaundiced view of reliance as a basis for legal obligation, Gibson then addresses the various parts of Article 2 which have sometimes been supplemented in one way or another by promissory estoppel, attempting to show such supplementation to be wrong both historically and substantively.¹⁴² Then he takes a giant step back to the days of Learned Hand¹⁴³ and launches a broadside assault against promissory estoppel in general. Llewellyn’s misgivings about promissory estoppel apply equally well outside of Article 2, Gibson asserts, and those misgivings were well-founded. Seen through Gibson’s eyes, Article 2 becomes

140. Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659 (1988).

141. *Id.* at 672-74.

142. *See id.* at 674-706.

143. *See James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933).

(at least as applied by courts that truly understand it) a successful experiment in doing away with promissory estoppel, an experiment that courts and future Restatement drafters should heed and emulate. On the one hand, Gibson concludes, they should continue by relaxing formal rules to make it ever clearer that "the presence of agreement is the key basis for determining enforceability."¹⁴⁴ On the other, they should relegate promissory estoppel to its original role, the area of intrafamily promises and donative gifts.¹⁴⁵ "In this manner," he concludes, "today's unnecessary, unlimited, and unwarranted expansion of promissory estoppel can be checked, and contract fully resurrected."¹⁴⁶

When faced with an archaeological dig of the magnitude of Professor Gibson's, anyone not disposed to pick up a shovel of his own can only marvel at the achievement. And, in the absence of such independent excavation, there seems little basis for quarreling with Gibson's conclusions about Llewellyn's thoughts on this or any other topic. But that of course need not end the discussion. Llewellyn may have been the architect of Article 2, but he doesn't control it now, any more than Frank Lloyd Wright controls what hangs in the Guggenheim Museum. The Code has become—as Karl Llewellyn hoped and believed it would—a living thing in its own right.¹⁴⁷ What Llewellyn thought about the Code is certainly entitled to thoughtful consideration, but it should not be seen as controlling today.

What matters to us, here, is not whether Gibson is right about Llewellyn. More important is whether Gibson (and, presumably, Llewellyn) are right about the role of reliance in Article 2. And even more important is whether they are right, not just about Article 2, but about promissory estoppel in general. If they are, their view has serious implications for the direction contract law should be taking in this postmodern period.

As to Article 2, the question for us is complicated by the imminent arrival on the legal scene of Article 2, the Sequel—"Article 2 II," the revised version of that statute. At this writing, its final form is not apparent, and among the unresolved matters are some of considerable relevance here, such as the retention of the statute of frauds, section 2-201.¹⁴⁸ But looking just at the existing Article 2, it is possible to

144. See Gibson, *supra* note 140, at 716.

145. See *id.* at 716.

146. *Id.* at 662.

147. See Llewellyn, *supra* note 134. Llewellyn spoke approvingly of the Uniform Sales Act because "[t]he Act moves into free and fertile creation, in terms of buyers and sellers at work in life." *Id.* at 381. And also, "[p]olicy and principle must fit the facts, and must be rebuilt to fit the changing facts." *Id.* at 409.

148. Early versions of the revised draft of Article 2 would have repealed the statute of

argue that the Gibson view is one-sided, and that Article 2 in its own way is just as "schizophrenic" as the Restatement (First) appeared to Gilmore.

Gibson stresses repeatedly that in Llewellyn's eyes it was the "agreement" that mattered, not any reliance on it. Free the parties from the artificial constraints of consideration doctrine and excessive formality, he asserts, and the agreement is all we need to know.¹⁴⁹ But this is only half the story. Article 2 and related sections of the Code are permeated with invitations—indeed, exhortations—to the courts to consider not only what the parties have said, but how they have behaved. The parties' course of performance of the agreement in question and their course of dealing in carrying out other similar agreements, can be by implication a source of the agreement, and not just clues for interpretation.¹⁵⁰ Since any course of performance of an agreement would necessarily be a kind of reliance on that agreement, reliance will be relevant to the enforceability of the relying party's version of the agreement.

Once past the initial agreement stage, the role of reliance under the Code is even plainer. Section 2-209(1)—Llewellyn's answer to the "pre-existing duty" limitation on "one-sided" modifications—expressly negates any consideration requirement for the modification of an existing agreement. However, 2-209(3) reminds us that enforcement of a modification might depend upon its satisfying the statute of frauds (2-201), and 2-209(2) adds another potential hurdle, by validating the "written-modifications-only" clause, thus permitting the creation of a "private statute of frauds" (a step which the common law had generally declined to take).¹⁵¹ Up to that point, 2-209 appears to have given with one hand and taken with the other. The consideration barrier to modification is removed, but the formal barriers are raised. In the latter part of 2-209, however, a dramatic shift occurs. If the parties have agreed to a modification but failed to satisfy either the statute of frauds or (if present) a "private statute of frauds," the

frauds, section 2-201. In 1997, however, its retention was recommended by the Drafting Committee and approved by the American Law Institute at its May meeting. As of May 1, 1998, the proposed revision of section 2-201 would generally continue the policy of the present section 2-201. Unlike some earlier proposals for its revision, the new section would not explicitly provide that reliance might overcome the statute's bar to enforcement; however, Notes to the proposed new section indicate that commentary will state that revised section 2-201 does not preclude the estoppel defense, the application of which should be guided by Restatement (Second) section 139. See U.C.C. Revised Article 2, Sales, 19-21 (Discussion Draft, May 1, 1998).

149. Gibson, *supra* note 140, at 662.

150. See U.C.C. §§ 1-201(3), 1-205, 2-202, 2-208 (1990).

151. See, e.g., *Berg and Assocs. v. Nelsen Steel & Wire Co.*, 580 N.E.2d 1198, 1204 (Ill. App. Ct. 1991).

attempted modification may amount at least to a "waiver" under 2-209(4). Under 2-209(5), that waiver may be non-retractable (i.e., binding) if retraction would be "unjust in view of a material change of position in reliance on the waiver."

Gibson does not discuss these provisions of the Code, so we cannot tell from his account how he (or Llewellyn) would regard them. But these sections do indicate that, at least once Article 2's initial "agreement-in-fact" hurdle has been jumped, the existence (and the proof) of reliance on promises to modify or vary that agreement can be crucial to their enforceability. The commentary to the section offers little explanation of subsection (4), and none at all of (5). They have been used, however, as must have been intended, to override both the formal legal requirement of the statute of frauds and the formal extra-legal requirement of the "private statute of frauds," in cases where substantial reliance had occurred and injustice would otherwise result.¹⁵² So whether Gibson is right about Llewellyn's view of reliance as irrelevant to the initial enforcement of an agreement which failed to satisfy the formal barrier of the statute of frauds, Llewellyn certainly intended reliance to have the power to trump formal shortcomings of a later agreement to waive or modify elements of the initial agreement.

In any event, regardless of whether Gibson's research has yielded an accurate picture of Llewellyn's views, Gibson has at least given us a picture of his own views, which are strongly opposed to the expanded use of promissory estoppel in the business context. Whether Llewellyn's too or only Gibson's, those views cannot be lightly dismissed, representing as they do a reasonable, consistent position—one with venerable historical antecedents, one that is probably held by many today, and one that if conscientiously adhered to would ultimately undo nearly a century's worth of significant development in the common law of contract. To be sure, Gibson would allow for a continuing role for promissory estoppel, but its domain would be, if not trivial, at best marginal: intrafamily promises and charitable gifts.

For a doctrine that only a decade or so ago was thought by some to be on the verge of swallowing up contract law whole, that's pretty slim pickings. Even if promissory estoppel is no longer the guest of honor, should it really be given a table in a corner near the kitchen, where it won't disturb the other guests, and be forced to survive on

152. See, e.g., *Albany Roller Mills, Inc. v. Northern United Feeds & Seeds, Inc.*, 397 N.W.2d 430, 433 (Minn. Ct. App. 1986) (allowing waiver of clause through behavior under U.C.C. section 2-209(4)); *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 436 N.E.2d 1265, 1271 (N.Y. 1982) (referring to U.C.C. section 2-209(5) to overcome no-oral-modifications clause).

leftovers? Gibson seems to think so. But among the recent commentators he seems to be alone in taking such a jaundiced view of the role of reliance protection in contract/commercial law.¹⁵³ As we have seen (and will see again), the perils to promissory estoppel come not just from its enemies, but from its friends as well.

E. Life at Aunt Sally's: Reliance Reformed

After Gibson's broadside attack, all was briefly quiet on the promissory estoppel front. But in 1991, Professors Edward Yorio and Steve Thel joined the fray, with an article entitled, with admirable brevity, *The Promissory Basis of Section 90*.¹⁵⁴ Their article in some respects resembles several of those discussed already, but its combination of several themes into one powerful argument deserves special attention.

Like F & M before them, Yorio & Thel (Y & T) have looked at the decided cases and concluded (like F & M, assertedly to their own surprise) that the essence of promissory estoppel appears to be not reliance-protection, but promise-enforcement.¹⁵⁵ Section 90 calls for actual reliance, and the courts usually profess to require it as well, but in many cases recovery is granted on this theory where little or no reliance is discernible.¹⁵⁶ Conversely, they report, when recovery is denied ostensibly for lack of reliance, that result can usually be equally well explained by some other factor—"lack of a promise, unforeseeability of reliance, or failure to comply with a condition of the promise."¹⁵⁷

A substantial part of the Y & T article is devoted to the question of the proper measure of relief for promissory estoppel.¹⁵⁸ Although the Restatement (Second) and most of the earlier commentators appeared to favor a rule that would call for reliance damages in many if not all section 90 cases, the reality, according to Y & T, is that this is simply not what the courts in fact are doing.¹⁵⁹ An expectation remedy—sometimes specific relief, usually expectation damages—is routinely awarded in promissory estoppel cases, usually without even lip

153. One might add here Professor Jay Feinman, whose work is discussed *infra* in the text accompanying notes 170-203, but as we shall see Feinman takes a jaundiced view not merely of promissory estoppel but of the whole neoclassical structure.

154. Yorio & Thel, *supra* note 4.

155. *See id.* at 112-15.

156. *See id.* at 152.

157. *Id.* at 158.

158. *See id.* at 116-23.

159. *See id.* at 119.

service being paid to the possibility of a lesser degree of remedy.¹⁶⁰ Rejecting other possible explanations for this phenomenon (greater use of promissory estoppel in commercial cases, for instance), Y & T point out that the expectation remedy was from the beginning Professor Williston's vociferously stated preference for the remedy in promissory estoppel cases. Wheeling out once again the ubiquitous "Johnny and the Car" colloquy from the A.L.I. debate over adoption of the Restatement (First), Y & T demonstrate Williston's tenacious support for a full-expectation remedy, no matter what.¹⁶¹ This goes to show, they argue, that at least in Williston's eyes section 90 was not really directed to the protection of reliance per se—if it had been, the commentators would be right; reliance damages would be the appropriate remedy.¹⁶²

Just as Gibson invokes the spirit of Llewellyn to castigate any incorporation of reliance-protection into Article 2, so Y & T invoke the equally venerable and considerably more classical shade of Samuel Williston for the proposition that section 90 is centrally concerned with the identification of enforcement-worthy promises. The bargain principle does a good job of that, as far as it goes, but there are promises which may fail that test and yet deserve the law's protection. As articulated by the original section 90, these can be identified by the nature of the promise itself. First, it must indeed be a promise—a true commitment. Second, it must be a promise which the promisor can foresee is likely to induce reliance. Third, that foreseeable reliance must be of a definite and substantial character. When a promise meets those tests, it will also serve the purposes of a formal requirement, as delineated by Professor Lon Fuller.¹⁶³ The most important of these is the cautionary effect: The promisor will be (or should be) conscious of the seriousness of her act, in light of the potential consequences.¹⁶⁴

Once such a promise is made, it won't take a lot of reliance to

160. Accord Farber & Matheson, *supra* note 61, at 909.

161. Yorio & Thel, *supra* note 4, at 116-19 (quoting *Proceedings at Fourth Annual Meeting*, 4 A.L.I. PROC. 95 *et seq.* (1926). A fuller version can be found in PETER LINZER, A CONTRACT ANTHOLOGY 339 (2d ed. 1995)).

162. Yorio & Thel, *supra* note 4, at 118.

163. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

164. See Yorio & Thel, *supra* note 4, at 126-27. Y & T criticize the deletion of the "definite and substantial" language from section 90 in the Restatement (Second). *Id.* at 125-29. These changes, apparently made in order to facilitate remedy limitation in appropriate circumstances, appear to them to miss the point of the original version, in Williston's eyes: that we can identify a seriously intended promise when we know the promisor had reason to anticipate reliance that was both "substantial" (i.e., of significant magnitude) and "definite" (i.e., of a particular kind). *Id.*; see also *Proliferation*, *supra* note 3, at 58-59.

produce enforceability, Y & T suggest. This is not because reliance will be absent, but because the nature of the potential reliance that the promisor should reasonably have foreseen is what matters, not the degree of actual reliance.¹⁶⁵

The Y & T analysis echoes F & M in its downplaying of actual reliance as a requirement for recovery, but is more ambitious in its reach. The Y & T discussion of the relation between foreseeability of reliance and seriousness of intention rings true, in its stress on the cautionary effect of reliance. Unlike Barnett & Becker,¹⁶⁶ however, Y & T do not appear to insist on intention to be legally bound as a touchstone for enforceability. They find a broader utility than did Kostritsky¹⁶⁷ in the section 90 rule, and they surely are far more hospitable than Gibson¹⁶⁸ to the notion that promissory estoppel can play a useful role even in commercial transactions. Does the Y & T analysis pose any peril either to promissory estoppel as an accepted doctrine or to reliance protection as a goal of contract law?

This is not an easy question. On the face of it, the answer might well appear to be no, it doesn't. After all, Y & T never say that courts should stop using promissory estoppel at all, or even that they should use it less than they do. In their profession of fealty to Samuel Williston's original vision, Y & T would give promissory estoppel the full remedial force that some others have found doubtful, on the one hand perhaps weakening its relation to reliance, but on the other strengthening its potential force. So "promissory estoppel" viewed as a category of promise enforcement seems safe in their hands. And as far as reliance-protection is concerned, they nowhere suggest that reliance, if it is indeed induced by a "reliable" promise, should go unprotected—merely that reliance may not be a requirement for liability. So why should it matter that they stress the "promissory basis" of promissory estoppel to the near exclusion of everything else?

As we shall see immediately below, in the eyes of some it doesn't matter—not at all. As for me, if it does matter, it's because the Y & T analysis is one more step toward the obliteration of promissory estoppel, rendering it virtually indistinguishable from something else. For F & M, it's really like consideration—only a little looser. For Kostritsky, it's like the rules that protect against duress, undue influence, fraud, or anything else that impedes knowledgeable and effective bargaining—only a little less focused.¹⁶⁹ And for Y & T, it really

165. See Yorio & Thel, *supra* note 4, at 152.

166. See Barnett & Becker, *supra* note 104.

167. See Kostritsky, *supra* note 95.

168. See Gibson, *supra* note 140.

169. And in that respect bearing a family resemblance to the doctrine of unconscion-

behaves just like "real" contract law, so that must be what it is. For Gibson, it's not even that—just a pseudo-contractual halfway house for needy relatives and charity cases. And to the extent that promissory estoppel actually does focus on real injury, B & B would exile it to the other side of the legal tracks—over there with the accident victims and the ambulance chasers.

If promissory estoppel wants to hold on to its place in the house of contract, everyone seems to agree, it has to clean up its act—to comb its hair, wear a tie, and tend to business just like all the rest of classical contract law. Like so many well-meaning Aunt Sallys, the promise theorists are determined to "civilise" promissory estoppel. But Huck Finn with his hair slicked down and his shoes shined becomes, well, just another Tom Sawyer. Should promissory estoppel become just another name for conventional, conservative contract law? Like Huck, we been there before.

F. Over the Rainbow: Reliance Repudiated

Among the many commentators who have joined in the ongoing debate over the future of promissory estoppel, Professor Jay M. Feinman is notable not only for the breadth of his vision, but for the persistence of his pursuit. In a pair of articles published in 1984, followed by a third in 1992, Feinman has reached the conclusion that promissory estoppel, far from being a possible solution to the problem of classical contract law, has itself become part of the problem.

In the first of his 1984 pieces, *Promissory Estoppel and Judicial Method*,¹⁷⁰ Feinman surveys the development of promissory estoppel and its use as a dispute-resolving device. After briefly tracing its historical development, much as this and countless earlier articles have done, Feinman—like Gilmore before him—concludes that the reliance principle, as developed both in the Restatement (First) and in the Fuller and Perdue reliance interest articles,¹⁷¹ has in it the potential to overwhelm the bargain principle almost completely. Since virtually every bargain-based contract dispute involves some degree of reliance, reliance-protection could be seen as the core principle in all such cases. The only cases necessarily dependent on bargain theory are those involving unrelieved-on, wholly executory agreements. Nevertheless, Feinman declares, bargain has remained the central concept, with reliance protection regarded as the exception, a corrective

ability, perhaps.

170. Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984).

171. See *id.* at 685.

device to be employed only where bargain fails to serve adequately.¹⁷² This continued primacy of bargain is buttressed, Feinman adds, by the persistence of expectation damages as the normal remedy in all cases.¹⁷³

Turning to an examination of promissory estoppel in action, as viewed in the decided cases, Feinman finds it incapable of generating principled results. As enunciated in section 90, the requirements of the doctrine are, he declares, simply too indeterminate to be helpful. Even with the aid of various supplementary modes of analysis—Llewellynian “situation-sense,”¹⁷⁴ Eisenbergish “normative analysis,”¹⁷⁵ Speidellic “mediating concepts,”¹⁷⁶ etc.—Feinman finds the section 90 elements elusive. In the end, he concludes:

[T]he search is futile. The problems . . . cannot be solved within a liberal legal system. Neither intensive fact scrutiny, nor normative analysis, nor any combination of the two can provide an objective method for judicial decision. As a matter of process as well as of substance, the fundamental dichotomies cannot be reconciled within our system of adjudication.¹⁷⁷

In his companion piece, *The Meaning of Reliance: A Historical Perspective*,¹⁷⁸ Feinman addresses the problem of how and why reliance-based protection in the form of promissory estoppel came to occupy its current place. Initially he considers two possibilities. First, the rise of reliance-based protection could be viewed as the logical development of increasing legal sophistication on the part of lawyers, judges, and legal scholars. Alternatively, it might be the legal system's response to forces generated by external economic and social developments.¹⁷⁹ But, he concludes, neither of those will do; neither the behavior of judges and scholars nor the needs of society furnish a satisfactory explanation of this (or indeed any other) complex legal phenomenon.¹⁸⁰ However, he suggests, one can identify a number of forces that appear to have played a part in this development, and Feinman proposes a list of several, ranging from existing legal doctrine and its academic critiques, through the legal process with its interplay of lawyers and judges, up to and including the prevalence of large-scale economic organizations and the growth of popular cul-

172. See *id.* at 686.

173. See *id.* at 687-88.

174. *Id.* at 698.

175. *Id.* at 708.

176. *Id.* at 712.

177. *Id.* at 718.

178. Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373.

179. See *id.* at 1375-77.

180. See *id.* at 1382.

ture.¹⁸¹

Having in his earlier *Judicial Method* article concluded that promissory estoppel as a legal doctrine is fundamentally indeterminate of legal results, and followed that up with a parallel conclusion that neither logic nor social needs provide a more helpful basis for understanding the reliance-protection phenomenon, Feinman ultimately concludes in *The Meaning of Reliance* that we are essentially on our own here. This conclusion he declares to be not "paralyzing," but "liberating:"

Deprived of certainty, some people adopt postures of abandonment, cynicism or nihilism. But we ought to rejoice in the law's indeterminacy, for it is that indeterminacy that gives us the freedom to choose. We are constrained in our choice by tradition, by logic, and by social circumstance only to the extent that we accept them as constraints.¹⁸²

What, then, do we choose? Donning his C.L.S. cap¹⁸³—which of course he has been wearing all along¹⁸⁴—Feinman steers us past the Scylla of classical contract's "abstraction and unreality"¹⁸⁵ and the Charybdis of conventional reliance's equally "false image of a just economic sphere regulated by moral principles,"¹⁸⁶ through the golden gate of "counterhegemonic dereification,"¹⁸⁷ into the safe harbor of—what? The outlines are dim, but the brave new world Feinman envisions appears to have a place for a revitalized reliance doctrine, transcending its present fixation on mere "actions induced by promises," and invoking norms expressive of "mutuality, solidarity, and power."¹⁸⁸

Apparently provoked (in both senses of the word) by the Y & T article discussed above, Feinman returned to the topic of promissory estoppel in 1992. In an article entitled—perhaps hopefully, perhaps ironically, certainly vainly—*The Last Promissory Estoppel Article*,¹⁸⁹ he sounds again the themes familiar from eight years earlier, played now against the counterpoint of a larger chorus of neoclassical voices.

181. See *id.* at 1383-84.

182. *Id.* at 1385.

183. See *id.* at 1387 & n.21.

184. See *id.* at 1373-74 & n.2.

185. *Id.* at 1386.

186. *Id.* at 1387.

187. *Id.* at 1388. This is the point at which Dave Barry would say, "I am not making this up," a fact of which Feinman is well aware; he preemptively concedes that such terminology is "sometimes derided as critical jargon," but declares it nevertheless to be "evocative and accurate." *Id.* at 1387.

188. *Id.* at 1389.

189. Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992). Maybe he just means it's *his* last promissory estoppel article.

Directing his attention to the above-discussed pieces by B & B,¹⁹⁰ Kostritsky,¹⁹¹ and F & M,¹⁹² Feinman finds them all, in varying degrees, symptomatic of the same underlying malady: an inability to transcend the limiting and stultifying framework of neoclassical contract law. In their preoccupation with the enforcement of promises, he observes, all these commentators start with the basic assumption of limited liability—no obligation exists in the absence of discrete promise. Even as tempered by more modern concepts of trade usage, implied warranties and the like, neoclassical contract law continues to insist on the primacy of promise, without which there can be no liability.¹⁹³

Reliance theory might have jolted contract out of this framework, Feinman suggests, but—as evidenced all too clearly by the commentary he discusses—has failed to do so. “It is time”, he declares, “for a paradigm shift.”¹⁹⁴ Drawing on the works of Professor Ian Macneil¹⁹⁵ as well as writings by himself and others, Feinman proposes a shift in the baseline approach to obligation, from neoclassical to relational contract theory. Stressing the relation rather than the discrete transaction as the source of obligation, relational theory “emphasizes the interdependence of individuals in social and economic relationships,” by focusing on “the necessity and desirability of trust, mutual responsibility, and connection among people.”¹⁹⁶ Even if a relational approach would ultimately yield results indistinguishable from those now reached in some types of cases, Feinman argues, those results would be better. They would be grounded, being the result of more complex analyses of individual situations, and focusing on a wider variety of applicable norms, both those generated internally by the parties and those generated externally by society.¹⁹⁷

Feinman’s conclusion is sweeping:

Is it likely that we will soon stop talking in terms of promissory estoppel and of the neoclassical framework of which it is a part? Perhaps not, as the weight of tradition is very great. There is, however, a growing recognition that the framework is ailing, if not moribund. The repeated attempts by neoclassical scholars to redescribe, reclassify, and reconceptualize section 90 cases seems to me to be a recognition of difficulty. . . . The prescription . . . is to stop

190. See Barnett & Becker, *supra* note 104.

191. See Kostritsky, *supra* note 95.

192. See Farber & Matheson, *supra* note 61.

193. Feinman, *supra* note 189, at 309-11.

194. *Id.* at 309.

195. See *id.* at 312 & n.51 (citing Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983)).

196. Feinman, *supra* note 189, at 312.

197. See *id.* at 313.

addressing old questions—by debating whether the core of section 90 is promise or reliance, for example—and address the more fundamental issue of what kind of framework we should have, for that will determine the questions we should ask.¹⁹⁸

Despite its title, it is clear that Feinman's latest thrust is aimed not merely at promissory estoppel, but at neoclassical contract law as a whole, top to bottom. And unlike his earlier *The Meaning of Reliance*, it does not appear from *The Last Promissory Estoppel Article* that "reliance doctrine," even in a broader sense, is to play any particular part in the New World Order of contract law that he envisions. Frustrated apparently by neoclassical contract's stubborn refusal to throw down its sword, Feinman has, like some modern Mercutio, pronounced with even-handed vehemence a plague on both the House of Bargain and the House of Reliance.

How might one respond to Feinman's challenge? In the face of such scorn for the existing order, a timid neoclassicist might be tempted, like Bert Lahr's Cowardly Lion, to skip the whole thing and exit through the nearest window. But, despite the smoke and flames arising from his apocalyptic vision, Feinman is, after all, just another man behind the curtain, cranking up his particular machine. His vision of an Emerald City is gleaming and green, but it's like the one in L. Frank Baum's original book—you have to be wearing his tinted spectacles to see it.¹⁹⁹ Ten or fifteen years ago, it just might have seemed possible that a host of judicial Scarecrows would follow the lead of a vanguard of academic Glindas, down the Yellow Brick Road leading to an Oz where all hegemonies would be dereified. Right now, though, we're still in Kansas, and if the wind is indeed blowing, it seems to be from a different direction.²⁰⁰

The foregoing comments are, of course, both too flip and too sweeping. The complex and thoughtful analyses of Jay Feinman and his colleagues—I am thinking particularly of Duncan Kennedy, but there are many others—have done much in this postmodern period to nudge the complacent rest of us to at least imagine, if only briefly, the possibility of better worlds than this one. The problems with Feinman's approach, however, are twofold. First, it really does not appear that the time is ripe for a judicial/academic palace revolution of the type apparently envisioned in the critical/relational camp. In *The*

198. *Id.* at 315-16.

199. L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* 187-88 (Morrow 1987) (1900).

200. My friend Jay Feinman will recognize here my acknowledgment of our mutual propensity to resort to Oz as the all-purpose metaphor. See, e.g., Jay M. Feinman, *Comments on Professor Spann's Paper*, 1 ANN. SURV. AM. L. 259 (1988); Charles L. Knapp, *In Honor of Norman Redlich*, 63 N.Y.U. L. REV. 5 (1988).

Meaning of Reliance, Feinman himself concluded that the flowering of a legal doctrine like promissory estoppel is a complex, many-faceted event, with numerous unquantifiable contributing causes.²⁰¹ The same would be true of the blossoming of relational contract law, were it to occur. No single law review article or judicial appointment or presidential election or cyberspace event could bring it to pass. All of those things and many more besides might be necessary. It may be in the cards, but it may not. In the meantime, we have to get from day to day with what we have. In his sweeping condemnation of all the existing neoclassical plumbing, Feinman seems to be suggesting that we throw out not just the bath water but also the baby, and maybe the bathtub as well.

On a more mundane level, we simply can't tell how Feinman's system would work. Feinman and other writers in the Critical Legal Studies vein have here and elsewhere attempted to respond to such criticism, by offering sketches of a reformed judicial process in action.²⁰² Even if one were persuaded that such a system could in fact exist—and many clearly are not²⁰³—it seems clear that a relational law of contract would be no more “determinate” than the contract law we have now. Feinman and others have repeatedly and with justification stressed the indeterminacy of the existing “liberal legal system,” but their proposed new model seems, in that respect at least, to be a scant improvement.

Indifferent though Feinman may be to any further neoclassical nit-picking, it does appear from his writings that the notion of promissory estoppel/reliance-protection once held in his eyes some potential for producing constructive change in the contract law system, by shifting focus away from the narrow bargain-based classical scheme to a greater emphasis on the role of trust and confidence in society. In the eyes of some of us, it still has that potential. Unless and until we all find our safe harbor on that far relational shore, it seems to this voyager prudent to keep reliance protection on board, if only as ballast to avoid too sharp a list to starboard.

G. Felix Unger Cleans House: Reliance Refurbished

In a recent issue of the *Journal of Legal Education*, Professor

201. See Feinman, *supra* note 178, at 1382-85.

202. Jay M. Feinman, *A Case Study in Critical Contract Law*, 1 ANN. SURV. AM. L. 273 (1988); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986).

203. See, e.g., Judith S. Kaye, *Comments on Professor Spann's Paper*, 1 ANN. SURV. AM. L. 265-69 (1988) (commenting on Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, 1 ANN. SURV. AM. L. 223 (1988)).

Randy Barnett revisits the subject of promissory estoppel. With an ironical tip of the hat to Grant Gilmore, Barnett entitles his new discussion *The Death of Reliance*.²⁰⁴ Commencing by recalling Gilmore's claim that contract is collapsing into a reliance-based branch of tort, Barnett observes that an earlier generation of law teachers and students probably accepted that thesis as essentially accurate.²⁰⁵ But, he asserts, modern scholarship has demonstrated that in fact this has not happened, and is not likely to happen. Instead of uniting around some "comprehensive explication of a reliance theory of contract" (which, he suggests, no one has furnished because it is not a viable enterprise), we have come to a "new consensus" that the doctrine of promissory estoppel is not primarily about compensating detrimental reliance at all.²⁰⁶ Instead, it is about the nature of promises that are deserving of enforcement.²⁰⁷

As would be expected from the above discussion of recent scholarship in this area, Barnett relies heavily on the articles discussed above by F & M and Y & T, along with his own earlier article written with Becker. Despite their differences, these three pieces sound essentially the same theme: The foreseeability of reliance to the promisor can be used as a means of identifying "reliable" promises. Once a promise is identified as "reliable," however, its enforcement is not dependent on the further question of whether or not it was relied on. What we call "promissory estoppel" is just another way (and not the primary way) of sorting out the wheat of enforceable promissory commitments from the chaff of other stuff. As further evidence of the "new consensus" he sees, Barnett points to the recent work of Jay Feinman,²⁰⁸ correctly noting that Feinman also has pronounced promissory estoppel as essentially dead (but hurrying past the fact that Feinman's obituary notice applies as well to all the rest of neo-classical contract law—presumably including Barnett's own work in this and prior articles).

Having thus set the stage, Barnett like others before him succumbs to the seemingly irresistible neoclassical temptation to bring

204. Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL. EDUC. 518 (1996).

205. See *id.* at 518. Barnett also discusses and attempts to refute Gilmore's argument that contract as we know it began as an offshoot of tort, contending instead that both "contract" and "tort" law as we know them probably date back only to the mid-nineteenth century. *Id.* at 520. Barnett's concluding observation on this point is that contract no more grew out of tort than tort did out of contract, which seems perfectly plausible although for our purposes largely irrelevant. See *id.*

206. *Id.* at 521-22.

207. *Id.*

208. *Id.* at 525 (referring to Jay M. Feinman, *supra* note 189).

forth a Restatement of his own.²⁰⁹ Since courts seem increasingly loath to move beyond the Restatement (Second),²¹⁰ it may, he suggests, be necessary to supply them with a new Restatement, one more reflective of the "new consensus." And he forthwith does just that, in a set of proposed new Restatement sections defining three categories of promise which in his eyes qualify for enforcement.²¹¹

Barnett's first category of enforceable promises is identical to the one proposed by F & M in 1985: the promise "made in furtherance of an economic activity."²¹² This rule (which he numbers section 71A²¹³) is, along with most of its supporting text, lifted verbatim from F & M, as Barnett makes clear.²¹⁴ The comments made above in the course of our discussion of the F & M article are therefore equally applicable to this portion of Barnett's thesis.²¹⁵

In the remaining sections of his proposed Restatement, Barnett expresses his views on the relative importance of formality and reliance. In a suggested section 71B, he indicates when promises failing to qualify under the "economic activity" rule might nevertheless be enforceable:

§ 71B. Enforceability of Noncommercial Promises

(1) A promise not made in furtherance of an economic activity is binding if the promise is in writing that is signed by the promisor and either

(a) is under seal, or

(b) recites a nominal consideration, or

(c) contains an expression of intention to be legally bound, or

(d) is also signed at the same time by the promisee.

(2) A promise not made in furtherance of an economic activity that

209. See *id.* at 529-36. If I'm throwing a small stone here, it's coming from a neoclassical glass house of my own. See Knapp, *supra* note 52, at 938-41 (proposing a restatement section asserting the enforceability of seriously intended promises).

210. Perhaps a little peevisly, Barnett laments the tendency of the courts to stay within the "safe-haven framework" of the Restatement (Second), rather than availing themselves of "very practical and accessible legal scholarship." Barnett, *supra* note 204, at 527.

211. See *id.* at 529-36.

212. *Id.* at 529.

213. As noted earlier, F & M had numbered their proposed new rule as section 71, reflecting their view that it would replace the present definition of consideration, without necessarily displacing the existing section 90. See *supra* text accompanying note 88. Barnett follows suit, numbering his new sections as section 71A, etc., but as we shall see he appears to regard the proposed four new sections as replacing not only the present section 71 but section 90 as well.

214. Barnett, *supra* note 204, at 529 n.1.

215. See *supra* text accompanying notes 71-94.

fails to meet the requirements of (1) is not ordinarily binding.²¹⁶

Barnett at this point is pursuing his earlier expressed preference for making promissory enforceability congruent with expressed intention to be bound.²¹⁷ Certainly, there is much to be said for the proposition that one should be bound whenever one manifests the intention to be bound. Writers both remote²¹⁸ and recent²¹⁹ have explored the notion of expanding our universe of enforceable promises to encompass apparently seriously meant expressions of intention to make a legally effective commitment, even if "gratuitous."²²⁰ So at least *prima facie*, Barnett's proposed rule in this section has much to commend it, although in the course of making this particular omelet he breaks a lot of eggs in the form of venerable case-law and existing Restatement provisions.²²¹ On the cautionary side, however, it should be noted that

216. Barnett, *supra* note 204, at 532.

217. This section 71A is complemented by his proposed section 71D, which further emphasizes the centrality of that factor. Of course, to make this factor controlling Barnett has to concede the necessity of a lot of implying and inferring, which he does in the commentary to section 71D. *See id.* at 534-35.

218. *See, e.g.,* Fuller, *supra* note 163, at 814-815; Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929 (1958).

219. *See, e.g.,* Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 822-825 (1997); E. Allan Farnsworth, *Promises to Make Gifts*, 43 AM. J. COMP. L. 359, 361 (1995); James D. Gordon, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283, 285 (1991); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 39 (1992); Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 569-570; Richard Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 412-414 (1977).

220. *See* Knapp, *supra* note 52, at 938 (proposing as a general rule that "[e]very promise made apparently with serious intention to perform is enforceable by any person foreseeably injured by its unjustified nonperformance").

221. Thus, in a mere six illustrations, he manages to do the following:

(1) In illustration 1, he declares that in a case like *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898), the classic early promissory estoppel case, the promise should be enforceable without reference to any reliance by the promisee. (*Ricketts* is discussed further in the text *infra* at note 384.) *See* Barnett, *supra* note 204, at 533.

(2) In illustration 2, he asserts that in a case like *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891), the uncle's promise should not be enforceable even though acknowledged in writing (apparently because the writing does not explicitly express an intention to be legally bound), without any suggestion at all that reliance in the form of performance by the nephew might make the promise enforceable. *See* Barnett, *supra* note 204, at 533. Given the tendency of courts and commentators over the years to regard the actual facts of *Hamer* (which did of course involve performance/reliance by the promisee) as justifying enforcement *either* on the basis of consideration or reliance, this repudiation seems bold, to say the least.

(3) In illustration 3, Barnett would make a written but clearly gratuitous intra-family promise (gift of a \$10,000 car) enforceable on the strength of the recital of a \$1.00 consideration. *See* Barnett, *supra* note 204, at 533. *Cf.* RESTATEMENT (SECOND) § 71 cmt. b (denial of this result). Of course, the Restatement (Second) does suggest, in section 87(1)(a), that "recital of a nominal consideration" could have the effect of making a

in neither his comments nor his illustrations to this section 71B does

promise binding, but that only applies to promises of irrevocability—the promise that an offer is “firm,” and will remain open for some stated time. RESTATEMENT (SECOND) § 87(1)(a). If the section 87(1)(a) rule applies, and the offer therefore remains open for acceptance despite an attempted revocation, the end result is not to make a gift promise binding, but simply to preserve the offeree’s ability to accept the offer, thereby creating a potentially enforceable, consideration-supported exchange agreement. Compare U.C.C. section 2-205, which similarly relies on the formality of a writing to make a firm offer binding. In apparent support of his rule, Barnett invites us to “compare” section 1 of the Uniform Written Obligations Act, which was promulgated by the NCCUSL in 1925 and thereafter uniformly ignored. *See* Barnett, *supra* note 204, at 532. (That doesn’t make it per se a bad idea, of course, but as Tevye says in “Fiddler on the Roof” about being poor, it’s no great honor either.)

(4) Barnett’s Illustration 4 demands to be quoted here in full:

4. A and B are living in the same household and are in an intimate sexual relationship. A, an executive, orally promises B, a musician, to support him for the rest of her life. The promise is unenforceable *regardless of whether B relies on the promise.*

Barnett, *supra* note 204, at 533 (emphasis supplied).

One scarcely knows where to begin. Can it be that B is unworthy of any protection whatsoever, despite perhaps months or even years of reliance on this promise, because he is a musician? Can it be that A should not have to keep any promises because she is an executive? (If anything, it could appear that those two facts in tandem make it somewhat more reasonable for A to have meant her promise seriously, or at least for B to have thought she did.) Is A’s promise unenforceable because she is a woman, and men have no right to expect women to support them, ever? And in that case, might the promise have been enforceable if the genders were reversed? (That’s so politically incorrect I could hardly bring myself to write it down.) Or can it be that Barnett, like so many courts before him, is scandalized to discover that these people have been living not merely in the same household, but in an “intimate sexual relationship”?

No, probably not. It’s probably just that the promise was oral, not in legalistic writing. Unfortunately, Barnett doesn’t give us the flip side of this case, in which the lady executive (played by Joan Crawford, perhaps?) *does* express in writing her intention to be legally bound by her promise to her musician lover (John Garfield, maybe). Under Barnett’s scheme, would that promise be binding? It’s hard to see why not—although whether it *should* be binding in the complete absence of any reliance or performance on B’s part might at least be questioned. This suggestion is by way of noting that Barnett’s insistence on the irrelevance of reliance presumably means that if a promise under his section 71B is binding at all, it’s binding *as soon as made*, before any change of position on the promisee’s part. One suspects this would create a lot more work for the doctrines of duress, fraud, undue influence and unconscionability, to mention a few.

(5) Finally, in illustration 6 to his section 71B, Barnett includes a donative promise to a charity (a “religious college”—Allegheny College, most likely), in a signed writing that includes a statement of intent to be legally bound. *See* Barnett, *supra* note 204, at 533. This promise, he declares, should be enforceable regardless of whether the college relies upon it. *See id.* In the present section 90, the Restatement (Second) would also make donative promises to charities enforceable per se—without requiring proof of reliance, but also without any particular requirement of form. The suggestion that in this area perhaps some minimal amount of formality should be required (at least in the absence of demonstrable reliance) seems worthy of consideration, however. *Cf.* CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 208 (3d ed. 1993).

Barnett take any note of the possibility that formalities may be manipulated by the knowledgeable at the expense of the less sophisticated.²²²

For our purposes here, however, the heart of Barnett's suggested "restatement" of promissory liability is in his next section, regarding the role of reliance:

§ 71C. Enforceability of Promises by Virtue of Reliance

(1) Detrimental reliance upon a promise is neither essential to the formation of a contract nor sufficient to justify enforcement of a promise.

(2) Nonetheless, a promise is enforceable by virtue of reliance when

(a) with the knowledge of the promisor, a promisee substantially relies upon it in a way that would be unlikely in the absence of a manifested intention by the promisor to be legally bound, and

(b) the promisee is aware that the promisor has knowledge of the promisee's reliance, and

(c) the promisor remains silent concerning the promisee's reliance.²²³

Barnett's commentary to this section indicates that the touchstone here remains the promisor's intention to be legally bound. Reliance can therefore have a legal effect only if the reliance is so extensive, so obvious to the promisor, and so acquiesced in that we can infer an intention on the promisor's part to be legally bound to her promise:

When a promisee makes large expenditures in reliance on a promise of a size that would not ordinarily be made in the absence of a legally binding commitment by the promisor and the promisee knows that the promisor is aware of these expenditures, by failing to warn or discourage the promisee from so relying the promisor's silence communicates an intention to be legally bound. Compare Restatement, Second, of Contracts § 69 (when silence constitutes an acceptance). In sum, the existence of these circumstances resolves the ambiguity that may have existed at the time the promise was made as to the contractual intentions of the promisor and justifies enforcing the promise.²²⁴

222. Compare U.C.C. section 2-205, which attempts to counter the possibility that a knowledgeable offeree might manipulate an offeror into signing a "firm offer," by requiring a separate signing of the irrevocability clause in such a case. Whether the Code's remedy will always be effective may be questioned, but at least the drafter of 2-205 was realistic enough to realize that legal forms may well present the knowledgeable party with an opening for opportunistic behavior.

223. Barnett, *supra* note 204, at 533.

224. *Id.* at 534. Besides his commentary, Barnett accompanies this section with only one illustration, which may have been modeled on *Greiner v. Greiner*, 293 P. 759 (Kan.

To a reader not quite so convinced of the correctness of Barnett's position, his section 71C(1) seems gratuitously insistent almost to the point of petulance, a sort of academic stamp of the foot. The section does, however, have a model in Restatement (Second) section 79,²²⁵ and is apparently intended to serve the same function—to direct courts away from now-discredited doctrines that they might otherwise be tempted to employ. Nevertheless, in this case such a directive seems not only gratuitous but misleading, since in subsection (2), Barnett is about to define a category of enforceable promises where reliance indeed does matter, perhaps decisively. At the very least (I know this sounds like nit-picking here—indulge me), a better-drafted subsection (a) would have begun, like so many other sections of the

1930), and seems both an accurate (if spare) precis of that case and a good illustration of the effect of the section 71B rule, as explained by Barnett's commentary:

1. A promises to convey to B, her son, a parcel of land for farming. B moves on the land and makes substantial improvements to it with the knowledge of A. A remains silent while B improves the land. A's promise is enforceable.

See Barnett, *supra* note 204, at 534.

If the *Greiner* case was indeed the model for this illustration, it is an apt choice. The senior Mrs. Greiner ("A") did apparently intend to be legally bound; over time she explored various ways (making a deed, writing a "contract", making a will) for expressing her commitment to her son Frank ("B"), although she never followed through on any of them, and eventually tried to evict him.

Compared to Barnett's nutshell version, quoted above, *Greiner* is also a good example of the richness of case law that is likely to get lost in the translation to Restatementese. Not only did young Frank Greiner rely on his mother's promise, that reliance might have benefited the mother by improving the land (a restitutionary factor?). The plaintiff and some of his siblings were disinherited by their late father in favor of other children, an inequity which their mother was apparently trying to correct, possibly feeling she should have prevented it (moral obligation?). The mother was apparently illiterate, which helps explain her failure to invoke the formalities mentioned above (recall Kostritsky's discussion of "barriers to bargain," discussed in the text *supra* at notes 97-103). The mother was also apparently subjected to pressure by a rival son (possible undue influence, not by the promisee, but against him). In addition, unlike the promisors in many other family-promise cases, Mrs. Greiner was still alive when Frank's suit was brought, which may strengthen the importance of the various other factors mentioned above. In many of the well known cases, there is no reason to suppose that the promisor ever had a change of heart about performing, but his or her successor in interest nevertheless declined to perform without judicial compulsion. The *Greiner* case is further discussed in the text *infra* at notes 378-83.

225. That section provides:

- If the requirement of consideration is met, there is no additional requirement of
- (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
 - (b) equivalence in the values exchanged; or
 - (c) "mutuality of obligation."

RESTATEMENT (SECOND) § 79. Similar language, but including a reference to reliance, is contained in the F & M commentary to their proposed section 71, which is repeated by Barnett. See Farber & Matheson, *supra* note 61, at 931; Barnett, *supra* note 204, at 529.

Restatement and the U.C.C., with the cautionary phrase, "Except as provided in this section . . ."

That's a question of drafting emphasis, though, not substance. The real questions of substance come in section 71C(2), the heart of Barnett's treatment of reliance. Here, as noted earlier in our discussion of his article with Becker, the problem is not with what Barnett would include in the area of enforceability, but what he would exclude.²²⁶ As far as it goes, the section would appropriately describe cases where enforcement has been and should be given. But there are some narrowing aspects to this rule, intended or not. For one thing, Barnett seems to insist that the promisor actually know of the reliance as it is happening, and "remain[] silent."²²⁷ Does he actually mean by that language to exclude the case where Aunt Betty says, "Susie, for your birthday next month I'm going to give you \$5,000 to buy a car," to which niece Susie replies, "Thanks, Aunt Betty, I'll buy one next week," and then does so—by which time Aunt Betty is off on a vacation to Bermuda? Does Susie have to fax Aunt Betty, "I'm at the car dealer's, Aunt Betty, and about to buy the car; it's your last chance to warn or discourage me from so relying on your promise," and then wait a reasonable time for Aunt Betty's reply? There is no obvious bright line between knowledge that the promisee is relying right now and knowledge that the promisee is going to do so at some future time, except in the degree of urgency with which an immediate disclaimer might be called for. A cynic might be pardoned for suspecting that Barnett is just putting up procedural roadblocks here, to make reliance enforcement as difficult as possible without doing away with it entirely.

Even that may appear to be haggling over drafting, though, or changes in emphasis. The real heart of Barnett's proposed rule, and of my differences with it, is the key phrase in (2)(a): The promisee's reliance must be such that it "would be unlikely in the absence of a manifested intention to be legally bound."²²⁸ As we have seen earlier,²²⁹ Barnett's whole concept of contract is of liability that the promisor incurs because, and only because, he or she manifests an intention to be legally bound. In his first suggested rule (borrowed, of course, from F & M), the consent to be bound is not explicit, but

226. See also *supra* text accompanying notes 119-26.

227. See Barnett, *supra* note 204, at 533. Even this choice of words is interesting. Since Barnett is concerned that the promisor never be held to any obligation she didn't apparently intend to assume, the phrase "remains silent" works better for him because it seems somehow to connote an *act* on the promisor's part—even though "does nothing" would have meant exactly the same thing.

228. *Id.*

229. See *supra* note 119 and accompanying text.

merely presumed from the fact that the promise is made "in furtherance of economic activity."²³⁰ In Barnett's second rule, either explicit expression of an intention to be bound or the invocation of some legal-type formality²³¹ serves that purpose. True to his libertarian principles, Barnett refuses in section 71C to countenance enforcement based on reliance unless it too can somehow be squeezed into the Procrustean bed of "expressed intention to be bound." But to reach that position, he has to amputate a sizable portion of the cases that would otherwise easily qualify for enforcement under the present Restatement (Second) section 90. Unlike F & M, or even Y & T, Barnett isn't intent merely on rationalizing our willingness to enforce promises in the absence of reliance, he also wants to severely cut back our ability to enforce them even in the *presence* of reliance. In my earlier discussion of the article by B & B, I have already suggested my differences with the "intention to be bound" analysis as a standard for reliance protection.²³² In this proposed set of new rules, Barnett has made very clear what was only hinted at before: Much perfectly reasonable and substantial reliance upon apparently serious promises would not be protected under his scheme—at least not by contract law.²³³

The implications of all this become even clearer in the light of Barnett's final suggested rule:

§71D. Intention to Create or Alter Legal Relations

(1) To be legally enforceable as a contract, a promise must be made in such a way as to manifest the promisor's intention to be legally bound.

(2) When the conditions of §§ 71A, 71(B)1 or 71C(2) are satisfied, it is presumed that the parties intended that their commitments be legally enforced.

(3) A promisor may rebut the presumption created by (2) by showing that a reasonable person would not have understood the promisor to have intended the promise to be legally binding.²³⁴

Commentary amplifying subsection (3) indicates that "manifested intention that a promise shall not affect legal relations" may serve to rebut what would otherwise be the inference of intent to be drawn from the making of a promise in a commercial setting.²³⁵

230. Barnett, *supra* note 204, at 532.

231. See Barnett, *supra* note 204, at 533. Merely "legal-type," because without Barnett's rule or something like it these various "formalities" would probably have no legal effect today, even if they might have at some earlier time.

232. See *supra* notes 119-126 and accompanying text.

233. See *infra* notes 240-48 and accompanying text.

234. Barnett, *supra* note 204, at 534.

235. *Id.*

It is tempting to regard section 71D as further evidence of an intention on Barnett's part to carry us all back to the bad old days of form-over-substance, where the sophisticated and well-counseled can easily take advantage of the less-so, either by inserting boilerplate disclaimers of liability where one would otherwise assume it to be present, or by foisting statements of intention to be bound on willing but ignorant adherents to already drafted forms which they expect to have less binding effect.²³⁶ Tempting, but perhaps unfair. Subsection (3) is, after all, couched in terms of what a reasonable person would take to be the promisor's intention, not merely what the writing says.²³⁷ Also, as one of two illustrations to this last of his suggested rules, Barnett provides the following:

2. A, a long-term employee with B corporation, sues for severance pay after being separated from the company. The basis of A's claim is a portion of the employee handbook entitled "Separation Allowance." The Separation Allowance section states that "[t]he inclusion of a schedule of separation allowances in the handbook, together with the conditions governing their payment . . . is not intended nor is it to be interpreted to establish a contractual relationship with the employee." The last page of the handbook also contains an express, conspicuous disclaimer. Absent other circumstances indicating that B corporation had an express policy of not observing the stated limitations or that a reasonable employee would not have seen or understood the disclaimers, A's claim fails.²³⁸

This illustration supplies to some extent a needed corrective to Barnett's emphasis on "manifested intention"; boilerplate disclaimers might be insufficient in themselves, or might be overcome by words or conduct. Interestingly, however, the corrective comes not from Barnett, but from F & M. Barnett simply retains this comment from their earlier article, where it served to illustrate their "economic activity" rule.²³⁹

As his parting shot, Barnett in a final comment to his section 71D suggests that promises not enforceable under his scheme might yet be

236. This misleading of the ingenuous by the ingenious is often accomplished by oral representations that are likely later to be excluded from judicial consideration by the parol evidence rule, particularly if—as is probable—the form contains a strong merger clause designed to invoke that rule.

237. The suggested standard of section 71D(3) seems a little narrow in another respect. Should the question be merely what some hypothetical "reasonable person *would* have understood" the promisor to intend? Or should it be a two-step inquiry: (a) What did the promisee *in fact* understand the promisor to have intended?; and then (b) *Could* a reasonable person have so understood? Of course, this is apart from the question of whether "intent to be legally bound" is the appropriate standard of intent at all.

238. Barnett, *supra* note 204, at 535.

239. See Farber & Matheson, *supra* note 61, at 933.

bases for liability on some other ground. One possibility he mentions is "restitution," referring to Restatement (Second) section 86. He provides two illustrations of that possibility, one a very truncated version of *Webb v. McGowin*²⁴⁰, the famous "falling block" case.²⁴¹ Another possibility is that a promise might be actionable in tort if it amounts to "negligent misrepresentation."²⁴² This suggestion was made in the B & B article discussed above,²⁴³ and is illustrated here with two examples, both apparently based on well-known and much-discussed promissory estoppel cases, *Goodman v. Dicker*²⁴⁴ and *Hoffman v. Red Owl Stores, Inc.*²⁴⁵

Why this contract/tort line is such a sore spot with commentators like Barnett has never been clear to me. A writer who stresses the possibility that contract law might actually be concerned with the intentional or negligent infliction of harm by one actor on another is seen by them as a "tort" theorist. Contract law, they seem to feel, must be concerned only with "promises," and their enforcement. But promises induce reliance, and reliance unmitigated (and unmitigatable) is a kind of injury, even if the only injurious impact is the loss of a hypothetical expectancy of profit.

If anything, it seems to me that those of us who inhabit the domain of contract ought to welcome the law of promissory misrepresentation (innocent, negligent or even intentional) into that domain (perhaps with dual citizenship),²⁴⁶ rather than attempting to deport

240. 168 So. 196 (Ala. Ct. App. 1935).

241. See Barnett, *supra* note 204, at 536. The implication here seems to be that such cases should be shifted out of the Restatement of Contracts and over to the restitution area. As Professor Henderson has suggested, such cases are more than pure restitution, however, and can more appropriately be labeled "promissory restitution." Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1118 (1971). Such cases have been encompassed by the Restatement of Contracts until now, and there seems no obvious reason—short of analytic rigidity—to expel them. For that matter, the *Webb* case itself could probably have been decided for the plaintiff on Barnett's section 71A, given the extra facts of that case supplied by Professor Farnsworth. FARNSWORTH, *CONTRACTS*, *supra* note 16, at § 2.8 n.27.

242. Barnett, *supra* note 204, at 536.

243. See Barnett & Becker, *supra* note 104, at 485-87.

244. 169 F.2d 684 (D.C. Cir. 1948).

245. 133 N.W.2d 267 (Wis. 1965).

246. Shifting the law of promissory fraud wholesale into contract and out of tort could result in a drastic limitation on the availability of punitive damages (a development hardly designed to delight plaintiffs' attorneys). On the other hand, modern contract law has been increasingly hospitable to the notion of punitive damages where fraudulent conduct is involved. See, e.g., *Greenstein v. Flatley*, 474 N.E.2d 1130, 1134 (Mass. App. Ct. 1985). See generally, John A. Sebert Jr., *Punitive and Nonpecuniary Damages Based on Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. Rev 1565, 1606-1611 (1986).

reliance-protection as an undesirable alien. Certainly the possibility of a fraud count (either for rescission or for damages) is something that the plaintiff's counsel pursuing an intentional breach of promise must frequently consider. Indeed, in many cases it would probably be actionable malpractice not to consider it. And yet our first-year-of-law-school mentality insists on compartmentalizing fraud with torts, even though anecdotal empirical evidence suggests that many torts teachers spend little or no time on it.²⁴⁷ The insistence on doctrinal purity by Barnett and others smacks of nothing so much as the compulsive tidiness of a bunch of academic Felix Ungers, so intent on neat ordering that they ignore the uses to which the lawyering Oscar Madisons of the real world may put these doctrines. People make promises, people break promises, other people get hurt. Is this tort? Is this contract? As Karl Llewellyn once pungently remarked, "What the hell!"²⁴⁸

H. The Game's Afoot: Reliance Rediscovered

Just as Professor Barnett's death notice for promissory estoppel was reaching publication, there appeared in two western law reviews a pair of remarkable articles by Professor Eric Mills Holmes, *Restatement of Promissory Estoppel*²⁴⁹ and *The Four Phases of Promissory Estoppel*.²⁵⁰ Both articles stem from the work Professor Holmes has done in revising a portion of Professor Arthur Corbin's multi-volume treatise on contract law. In the revised Volume 3 of that work, Professor Holmes has reported the results of his survey of the courts' use of promissory estoppel.²⁵¹ Drawing on that material, he furnishes in his *Restatement* article an exhaustive textual treatment (over 200 pages) of the case law of every American jurisdiction, from Alabama to Wyoming and from Maine to Guam.²⁵² In the introductory section of that article Holmes also provides his own version of the evolution of promissory estoppel over the years, a shorter version

247. Fortunately for today's law students, current contracts casebooks are more likely than those of an earlier day to devote at least some space to the issue of fraud and misrepresentation in agreement-making. See, e.g., RANDY E. BARNETT, *CONTRACTS—CASES AND DOCTRINE* 1103-24 (1995); KNAPP & CRYSTAL, *supra* note 221, at 622-58; EDWARD J. MURPHY, RICHARD E. SPEIDEL & IAN AYRES, *CONTRACT LAW* 471-98 (5th ed. 1997); ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 526-39 (2d ed. 1992).

248. KARL LLEWELLYN, *PUT IN HIS THUMB* 39-40 (1931).

249. Holmes, *supra* note 19.

250. Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45 (1996).

251. 3 ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* (Rev. ed. 1996).

252. Plus Puerto Rico, the Virgin Islands, and American Samoa.

of which history he recounts in the substantially similar *Four Phases* piece.

Although some earlier writers have surveyed the case law and reported that promissory estoppel is dead²⁵³ or at least dying,²⁵⁴ Professor Holmes²⁵⁵ reassures us—invoking predictably but appropriately Mark Twain's best known remark—that the reports of its death appear greatly exaggerated. Every American jurisdiction, he reports, has adopted and applies some version of promissory estoppel, most by judicial decision, two by statute.²⁵⁶ In separate discussions for each American jurisdiction, he shows how both state and federal courts²⁵⁷ have used various versions of that doctrine in numerous ways to provide relief unavailable under standard contract doctrine.²⁵⁸ Well-known leading cases take the stage when their particular jurisdiction is being considered,²⁵⁹ but obscure decisions—and conflict among the decisions—receive careful consideration as well. With an investigative zeal and a dogged devotion to detail worthy of his British namesake, Holmes appears to have run to earth and laid at our feet virtually every scrap of promissory estoppel law and lore one could hope for, and perhaps a little bit more.

For practicing attorneys, Holmes's *Restatement* provides a wealth of material, from their own and any other potentially relevant jurisdictions, with which to evaluate the possible utility of promissory estoppel doctrine in litigation or settlement negotiation. Although obviously a partisan of promissory estoppel (frequently lecturing courts that have reached results he finds untenable²⁶⁰), Holmes nevertheless is at pains to report rejections as well as acceptances of the doctrine, and to distinguish among the various uses of promissory estoppel, the different ways of characterizing its elements (some courts being more

253. See, e.g., Barnett, *supra* note 204.

254. Pham, *supra* note 60.

255. In this portion of our discussion, assume that references to "Holmes" mean Eric, and not Oliver W., unless otherwise stated.

256. But see *infra* note 264.

257. One of his interesting findings is the existence of a new and growing body of federal promissory estoppel law, as part of the federal common law. Holmes, *supra* note 19, at 266.

258. Holmes points out that an earlier survey by Phuong N. Pham failed to take into account federal cases applying state law, with the result that much case law of importance was not reported. Holmes, *supra* note 19, at 425 n.626 (discussing New York law).

259. See, e.g., *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927); *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958); *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

260. See, e.g., Holmes's discussion of Alabama case *Davis v. University of Montevallo*, 638 So.2d 754 (Ala. 1994). Holmes, *supra* note 19, at 303-04. And his discussion of Arizona law. See *id.* at 310-15.

restrictive and demanding than others²⁶¹), and the wide assortment of remedies that have been awarded.²⁶² An encyclopedic treatment, not necessarily intended to be swallowed and digested whole, this latter-day Restatement from a latter-day Holmes is intended ultimately, it appears, to persuade us not only that promissory estoppel is far from dead, but that it has grown so in depth and breadth that it has indeed become a proper candidate for a true Restatement of its own.²⁶³

For our purposes here, Professor Holmes's article is important in a number of respects. By furnishing chapter and verse on the case law, he provides a counter-balance to the "dead or dying" view of promissory estoppel. Even allowing for some optimism on Holmes's part in finding examples of promissory estoppel where others might not,²⁶⁴ Holmes has provided substantial evidence in the form of decided cases, many from the 80s and 90s, that promissory estoppel is pervasive and, for the time being at least, enduring.²⁶⁵ Reporting findings somewhat at variance from those of other recent scholars, Holmes also provides more support for the position that reliance damages are frequently the remedy of choice in promissory estoppel cases.²⁶⁶ Where other writers discussed above have conjured up the spirit of Samuel Williston or Karl Llewellyn, Eric Holmes—with some claim to legitimacy—invokes the patron saint of promissory estoppel,

261. Compare Holmes's discussion of *Mazer v. Jackson Ins. Agency*, 340 So. 2d 770 (Ala. 1976) (representing Alabama's limited phase one level of promissory estoppel application), Holmes *supra* note 19, at 302, with his discussion of *Aldrich v. Forbes*, 385 P.2d 618, 621 (Or. 1963) (stating that promissory estoppel can serve as a standard of elementary fairness). *Id.* at 294 n.73.

262. In particular, he is careful to distinguish between reliance and expectation damages, and to report and explain innovative hybrids in this area. See, for example, his discussion of Colorado law in which remedy is primarily reliance damages, Holmes, *supra* note 19, at 347-48; his discussion of Connecticut law, pointing out that courts will grant expectation damages as well as specific performance, restitution and reliance damages, *see id.* at 348-350; and his discussion of the Delaware case, *Chrysler Corp. V. Quimby*, 144 A.2d 123 (Del.), *aff'd on rehearing*, 144 A.2d 885 (1958), in which the court allowed both reliance and expectation damages. *Id.* at 352-353.

263. Holmes, *supra* note 19, at 516. Despite his article's title, Holmes—unlike so many of his contemporary colleagues—resists the temptation to draft some rules for us, probably because he appears to envision the projected enterprise not merely as a few new or revised sections in a sometime Restatement (Third) of Contracts but as a separate Restatement of its own, like the Restatement of Restitution. He does, however, essay a "summary" of such a restatement. *See infra* text accompanying note 278.

264. Holmes's discussion of Virginia law concludes that, however tortuously, Virginia courts have applied promissory estoppel in effect, and in an appropriate case would do so overtly. Holmes, *supra* note 19, at 478-83. In *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 493 S.E.2d 512, 516 (Va. 1997), however, the Virginia Supreme Court recently declared "promissory estoppel is not a cognizable cause of action in the commonwealth." *Id.*

265. *See, e.g.*, Holmes, *supra* note 19, at n.516.

266. *See id.* at 291; *see also* Hillman, *supra* note 43.

Arthur L. Corbin.²⁶⁷ And, like Corbin in Gilmore's account of the birth of section 90,²⁶⁸ Professor Holmes has spread before us the empirical case for promissory estoppel, implicitly challenging those who would ignore or minimize it in the name of doctrinal purity.²⁶⁹

Besides his contribution to our empirical knowledge, Holmes makes an attempt of his own on the theoretical side, providing a scheme with which to order and categorize the employment of promissory estoppel by the courts. In his historical introduction, he posits four stages in its evolution.²⁷⁰ Initially, he asserts, Stage One promissory estoppel can be discerned as it evolves from equitable estoppel. Stage One cases employ the estoppel device to deprive promisors of the ability to invoke defensively the statute of frauds, the statute of limitations, and perhaps the parol evidence rule.²⁷¹ Particularly interesting here to a non-historian is the extent to which Holmes's study furnishes evidence of nineteenth century case law of this sort. Used to thinking of promissory estoppel as initially a consideration substitute, only later to become a counter-defensive device, I was surprised to find Holmes treating these stages in the reverse order. He does not, however, assign them to particular time periods because he sees the different jurisdictions evolving through the stages at different rates of speed, with some still in the earlier stages.

In Holmes's Stage Two, promissory estoppel becomes the consideration substitute familiar to all of us.²⁷² In this stage, the courts tend to insist on promises that meet the tests of "certainty" and "definiteness" traditionally applied to offers, and the remedy for promissory estoppel will be a classic, benefit-of-the-bargain remedy, in true Willistonian, Johnny-and-the-car fashion.²⁷³ A significant minority of jurisdictions, Holmes reports,²⁷⁴ remain stuck at this stage of evolution—appearing in his eyes, one suspects, like mired amphibians unable to finally relinquish their gills, or frustrated mammals awaiting the appearance of the opposable thumb.

In his Stage Three, Holmes sees a subtle shift away from the

267. See Holmes, *supra* note 19, at 269 n.8.

268. GILMORE, *supra* note 7, at 63.

269. Holmes fittingly quotes Corbin's observation that legal "generalizations" are not purely theoretical, but must be "tested and altered and restated and abandoned in accordance with their application (or rejection) by the courts to the ever-changing problems of life." Holmes, *supra* note 19, at 269 n.8 (quoting Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 201 (1961)).

270. Holmes, *supra* note 19, at 270.

271. See *id.* at 277-78.

272. See *id.* at 284.

273. See *supra* note 161 and accompanying text.

274. From 14 to 16, by his reckoning. See Holmes, *supra* note 19, at 286.

promise-as-offer and toward the recognition of promise-as-commitment, including an increasing willingness to enforce assurances that although incomplete or indefinite are capable of inspiring reasonable reliance.²⁷⁵ Here, the gist of promissory estoppel is reliance-protection (which is seen as, if not actually sounding in tort, at least being tort-like), and the remedy may well be fashioned in terms of the reliance interest rather than benefit-of-the-bargain. The spirit of the shift which Holmes sees from Stage Two to Stage Three is apparently similar to the shift in tone from the Restatement (First) formulation of section 90 to the revised version in the Restatement (Second).

In the 1980s and 1990s, Holmes sees many courts moving beyond even that view of promissory estoppel, transcending the troublesome tort/contract division, to a yet higher stage. Holmes's Stage Four is characterized by the vision of promissory estoppel as a present-day manifestation of the spirit of equity, with a lineage that in Holmes's eyes is traceable back to the Lord Chancellor's royal mandate in 1349.²⁷⁶ One possible effect of this latest evolution could be a firmer vesting of control over the application of promissory estoppel in the hands of judges, and away from juries.²⁷⁷ Apart from that, Holmes paints a picture here of promissory estoppel as exhibiting the traditional characteristics of equity jurisprudence: the absence of rigid or mechanical rules, the importance of discretion, and the willingness to fashion remedies on a case-by-case basis.

Although Holmes eschews the temptation to present a proto-Restatement, featuring black-letter rules with accompanying commentary and illustrations, he does in conclusion provide what he calls a "terse restatement," a summary of what such a full-fledged restatement might reflect:

[Promissory estoppel] was born in ancient equity and assumpsit, and thereafter developed in four stages [A]t its most developed stage [it] is an equitable theory. . . . Subordinate legal classifications like contract and tort are covered under the umbrella of equity that can grant, among other relief, traditional contract damages as a consideration substitute or tort-like detrimental reliance damages. With its equitable underpinnings—good faith, conscience, honesty, and equity—promissory estoppel recognizes the promisee's right to reasonably rely, arising from the reasonable expectations created and foreseen by the promisor. The promisor's state-

275. See *id.* at 288-89.

276. See *id.* at 292 n.70.

277. See, e.g., *Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 174 (Utah 1993); *Nimrod Mktg. (overseas) Ltd. v. Texas Energy Inv. Corp.*, 769 F.2d 1076, 1080 (5th Cir. 1985).

ments and manifestations must objectively evidence a sufficient commitment or assurance on which a reasonable person foreseeably would rely. In such a case, the promisor has a duty to prevent a promisee's detrimental reliance. The remedy for breach is discretionary and personalized Courts can award expectation, reliance, restitution, specific performance, exemplary, injunctive, or other appropriate relief to . . . achieve corrective justice between the parties.²⁷⁸

How persuasive is Holmes's account? To one who has neither read all his history nor studied all his cases, the distinctions he draws between the various evolutionary stages are sometimes elusive—the distinction between offensive and defensive estoppel, for instance. But putting my own, perhaps simplistic, spin on his analysis, I see two points that seem particularly important to address.

The first is the distinction between the role of promissory estoppel as a basis for enforcing promises that otherwise would be unenforceable for lack of consideration, and its use to overcome defenses of form. In some future world of universal promise-enforcement, the consideration-substitute aspect of promissory estoppel may become superfluous. But until it is, promissory estoppel is still available, and can and should be employed in this way. Whether one calls this “defensive estoppel,” “offensive estoppel” or “consideration substitute,” the fact is it comes down to basically the same thing: It provides a reason to enforce a promise that otherwise would fail of enforcement because the plaintiff's basic case had not been made.

The defenses of form, on the other hand, are just that—defenses. In this area, the defendant's promise may well pass whatever version of the consideration test is currently being applied, but still fail to meet some formal requirement. The statute of frauds (public or “private”²⁷⁹) may apply, and not be satisfied. The statute of limitations may have run. The parol evidence rule may preclude the plaintiff's proof of an ancillary oral agreement. The defendant's promise may be deemed too indefinite or incomplete to warrant contractual enforcement. If the promise is as yet unrelieved-on, then the formal defense may prevail. If, however, the plaintiff has proceeded either to perform her side of the bargain or to rely in other ways on its performance by the other party, promissory estoppel may apply. Whether one regards this as an “estoppel” to invoke the defense, or as a kind of doctrinal end-run around it by employing a different theory of action than contract, or a sort of free-form manifestation of the court's inherent power of equitable dispensation, the end result is likely to be the same—some form of enforcement.

278. See Holmes, *supra* note 19, at 515-16.

279. See U.C.C. § 2-209(2) (1995).

Holmes's case-summaries vividly illustrate the variety of names by which the rose of reliance may be called. On the one hand, the court's choice of rhetoric can be significant, for it may control the scope of remedies available, the choice between judge or jury, or in borderline cases even the granting of any relief at all. But it should not obscure the underlying truth that by and large the courts are responding to the same perceived kinds of injustice, in basically similar ways.

The other point that emerges from Holmes's writings more vividly than in any of the other recent commentaries is the relationship of promissory estoppel to the long-standing tradition that in Anglo-American law we call "equity." By portraying promissory estoppel in its most fully-developed form as essentially an equitable doctrine, Holmes is able to brush aside as largely irrelevant the conflict between "contract" and "tort" theorists. That stuff, after all, is just "Law," the jurisprudential compartmentalizing that is our modern version of the old English writ system. "Equity" is not that kind of law, at all; that's precisely the point. It's a kind of meta-law, a superhero with a roving commission to do justice wherever justice cries out to be done. With his four-stage evolutionary structure, Holmes has constructed a metaphorical phone-booth where promissory estoppel can shed that three-piece suit, to reveal the cape and tights that were there all along.

Of more practical importance, probably, than the doctrinal transgression that Holmes's analysis suggests is the potential influence of equity jurisprudence on this area of law. As mentioned above, Holmes stresses the personalized, discretionary, case-by-case nature of equity which he sees reflected in the developing case law of promissory estoppel. But there is another aspect to the equity tradition that may be important as well: its traditional inclination to weigh the conduct of the parties in the balance along with their legal claims. In order more fully to do justice, equity invokes such concepts as "clean hands" and "unconscionability," and maxims like "he who would seek equity must do equity." Since its formulation in the original section 90, promissory estoppel has differed from conventional contract law in its overt emphasis on "justice;" in Holmes's Stage Four, this approach may if anything be broadened. Indeed, in the brave new world of equitable promissory estoppel, it seems the court might take into account virtually any aspect of the case that affects the "equities" of its decision. This is a far cry from classical contract's attempt to squeeze most disputes into a narrow and legalistic mold, with as few material facts as possible.

The world of promissory estoppel that Eric Holmes envisions, then, is not the cold, marble-floored world of Lionel Barrymore's old

Banker Potter, insisting on his full legal rights as proclaimed by formal documents of his lawyers' devising. It is the warm, Wonderful-Life world of Jimmy Stewart's *George Bailey*, where the harshness of legal rules is tempered by justice and mercy for all—the poor and downtrodden, most especially.

III. The Relevance of Reliance

In their discussion of the role of reliance protection in contract law, recent commentators have stressed the indeterminacy of that factor in judicial action. It is clear from the reported decisions, they declare, that reliance is simply not a decisive factor in contract cases. Recovery is often given under the rubric of "promissory estoppel" even when there has been no reliance; conversely, promissory estoppel recovery may be denied, even when there has been reliance.²⁸⁰

There is nothing to be gained from arguing with that pair of observations; they are probably true.²⁸¹ The problem is to state what follows from them. One conclusion that logically does follow is the negation of a purely reliance-based contract law. Whatever else can be said about the role of reliance in contract law, it's not the whole story. No problem there. The farthest one might go in that direction would be to suggest, as Fuller & Perdue did lo those many years ago, that the desire to foster reliance may underlie even our willingness to protect injuries to expectation, so that reliance-protection in a sense could be the generating force behind contract law.²⁸² Even so, if individual plaintiffs can be compensated for pure lost expectation in the absence of any change of position at all, then we cannot conclude that the protection of *actual* reliance is the single goal of contract law.

But once that point has been conceded, it by no means logically follows that the desire to protect reliance is irrelevant to the imposition of liability. Such a conclusion is compelled neither by logic nor by experience. The question rather is, what is the connection (or connections), and how should we fit reliance into our scheme of contract law?

To address that question, let's begin by dividing the subject into two parts. The first question posed by the F & M analysis is: Why do courts apply promissory estoppel in some cases where reliance seems

280. See Farber & Matheson, *supra* note 61, at 909; Yorio & Thel, *supra* note 4, at 151-61.

281. The slight hedging is with respect to the first conclusion, that recovery often occurs without reliance. As will be discussed below, one might differ with F & M about some of the cases they categorize as lacking in reliance.

282. Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, *supra* note 38, at 57-66.

to be absent? The second is: Why do courts in some cases deny reliance-based recovery even though reliance is demonstrably present? These two questions will be addressed in order in the discussion which follows.

A. Reliance-Based Liability in the Absence of Reliance

In their *Invisible Handshake* article, F & M make the following assertion:

The essential requirement for liability on a promissory estoppel theory has traditionally been some specific action in justifiable reliance on the promise. This requirement of an identifiable detriment no longer defines the boundary of enforceability.²⁸³

They then proceed to discuss several cases in which it appears to them that the plaintiff claiming the benefit of promissory estoppel was not in fact any worse off as a result of his actions—his “reliance” on the defendant’s promise.²⁸⁴ This proves, they conclude, that detri-

283. Farber & Matheson, *supra* note 61, at 910.

284. In support of their recovery-without-reliance thesis, F & M cite and discuss *Vastoler v. American Can Co.*, 700 F.2d 916 (3d Cir. 1983), and *Oates v. Teamsters Affiliates Pension Plan*, 482 F. Supp. 481 (D.D.C. 1979). In *Vastoler*, an employee of defendant American Can was persuaded to accept a promotion from hourly production worker to salaried supervisor by, among other things, a promise that his retirement benefits in the latter position would include credit for some years already worked, even though these would have not normally been covered by the plan. In *Oates*, an employee of the Seafarers Union was induced by Teamsters president James Hoffa to move to a similar position with the Teamsters (a competing union) by, among other things, a promise that Oates would receive retirement benefits from a Teamster pension plan (contemplated, but not yet in place) that would include credit for his years already worked for the Seafarers Union. Both promises were upheld on a reliance basis. F & M correctly point out that each case seemingly could have comfortably been fit into the bargained-for-exchange mold and recovery granted on that basis. In that event, they correctly assert, a showing of detrimental reliance would not have been necessary, merely a showing of consideration. But F & M also assert that a rigorous comparison of the plaintiffs’ before-and-after positions would have shown that in neither case did significant detrimental reliance take place, because each plaintiff was economically better off as a result of his change of position, even in the absence of any enforcement of each defendant’s promise. They dismiss the *Vastoler* court’s argument that plaintiff’s new position was a more stressful one as being mere “straining” by the court to reach a result. See Farber & Matheson, *supra* note 61, at 912. If “psychological factors” like this are sufficient for enforcement, F & M suggest, then “relatively few promises will fail to qualify for enforcement.” *Id.* Perhaps university professors are more inclined than ordinary folk might be to minimize the significance of crossing the line from labor to management, or of switching one’s allegiance from one union to another, thereby inducing a “mass exodus of officers and rank-and-file.” *Id.* at 913 (quoting *Oates*, 482 F. Supp. at 483 n.2).

In an important recent study of promissory estoppel in the courts and the law reviews, Professor Robert Hillman expresses his disagreement with the F & M conclusion, echoed by Y & T, Farber and others, that present-day courts are prone to apply promis-

mental reliance is no longer insisted on as an element of recovery.

The difficulty here is that F & M are confusing two issues commonly presented in promissory estoppel cases. One is whether the promisee actually took some action after the promise was made, in reliance on—or “on the strength of,” if you prefer—that promise. The other is whether the promisee is measurably worse off than she would have been as a result of that action.²⁸⁵ The first of those questions is mandated by the text of section 90 itself: Did the promise actually induce the promisee’s change of position? The second question has become part of the promissory estoppel literature not because the text of section 90 expressly demands it, but because of that section’s requirement that “injustice” will result unless the promise is enforced. How can there be injustice, courts have asked from the beginning, if the promisee is no worse off as a result of her change of position? So the courts and commentators assume that to trigger section 90 the reliance must have been “detrimental” to the promisee—so detrimental as to justify enforcement of the promise.

But “detriment” as reflected in the promissory estoppel tradition and “detriment” in the law of consideration are two different things. Where section 90 reliance is at issue, we usually assume that it must be detrimental in some “substantial” sense—probably economic, or at least in some way that makes the promisee clearly worse off, even if in an unquantifiable way. Otherwise section 90 would not apply, because our sense of injustice would not be aroused. Where the requirement of consideration is at issue, however, contract law has traditionally settled for the most insignificant of performances as a sufficient “detriment”—a hawk, a horse, a robe, a peppercorn.²⁸⁶ Holmes’s stress on the bargained-for exchange in no way nullified that aspect of earlier consideration doctrine; if anything, it accentuated it.²⁸⁷

sory estoppel without insisting on a show of reliance. See Hillman, *supra* note 43, at 597-601 (in cases studied where promissory estoppel was successful, reliance played a “crucial role;” in cases where promissory estoppel was denied, failure to establish reasonable, foreseeable, detrimental reliance was apparently a factor in more than half of the cases). Hillman also voices strong reservations about the case analyses used by F & M to illustrate the irrelevance of actual reliance to the application of promissory estoppel. See *id.* at 610-15.

285. Restatement section 90 in both its first and second versions contemplates forbearance as a type of reliance, so “action” in this context also includes the possibility of inaction, reliance of a passive type.

286. For discussion of the “peppercorn” theory of consideration, see FARNSWORTH, *CONTRACTS*, *supra* note 16, at § 2.1, indicating that “nominal” consideration could be effective if truly bargained for, but not if merely a sham.

287. As Professor Farnsworth points out, the bargain theory of consideration makes it unnecessary to consider the issues of detriment and benefit in assessing the presence of

Although F & M report that many purported section 90 cases involved no real "detrimental" reliance, they also concede that in some of those "non-reliance" cases the facts probably would have justified the court in finding that a true bargain existed.²⁸⁸ In such a case, it's not surprising that the plaintiff's change of position will be deemed sufficient for enforcement even if it hasn't really made her economically worse off. Even if they use the language of promissory estoppel, the courts in those true-bargain cases were probably content with only minimally "detrimental" reliance for the same reason courts usually are: When the promisor has proposed an exchange, and has actually received what he bargained for, this is sufficient "detriment" to enforce his promise, even if the plaintiff is not substantially worse off. Reliance that was *not* bargained for must be substantially detrimental to justify enforcement; *bargained-for* reliance need only be "technically" detrimental—something the plaintiff could have withheld, but did not.²⁸⁹

Take as an example a case not discussed by F & M, but similar to many others they do cite and discuss, *Katz v. Danny Dare, Inc.*²⁹⁰ I.G. Katz was a long-time employee of the Danny Dare company, having been at one time an officer of the corporation. He was also the brother-in-law of Danny Dare's president, Harry Shopmaker.²⁹¹ By 1975 Katz had reached the age of 67, and was in poor health, having been injured in a vain attempt to resist a robber stealing money from the company's store. Shopmaker and other officers of Danny Dare wanted Katz to retire, but were reluctant to fire him.²⁹² After several attempts, they finally in 1975 presented a package of retirement benefits that Katz found acceptable, and memorialized the promise of those benefits in a corporate directors' resolution. Katz did retire, and for a time the company made periodic payments to him. Eventually, however, a dispute developed, and the company refused to continue the benefit payments as promised. When Katz sued to enforce

consideration. Indeed, "[o]ne could argue that if a promisor chooses to bargain for something it must be a benefit to the promisor, and if the promisor needs to bargain for something in order to extract it from the promisee, it must be a detriment to the promisee." *Id.* at § 2.4. Farnsworth does not, however, accept Gilmore's account of Holmes as the father of bargain theory. See *id.* at § 2.2 n.4.

288. Farber & Matheson, *supra* note 61, at 913 n.43.

289. Under classical doctrine, consideration cannot consist of the promisee merely doing (or promising to do) something she was already obligated to the promisor to perform. See RESTATEMENT (SECOND) §§ 73, 75; see also FARNSWORTH, CONTRACTS, *supra* note 16, at § 4.21 n.6.

290. 610 S.W.2d 121 (Mo. Ct. App. 1980).

291. Shopmaker was the brother of Katz's wife. See *id.* at 122.

292. Despite many years of service for Danny Dare, Katz was apparently an at-will employee, with no contractual protection against discharge.

the promise on a promissory estoppel basis, the defendant argued successfully to the trial court that Katz had not detrimentally relied on its promise. Since he would have been fired anyway (a factual assertion by Shopmaker that the trial court apparently accepted as true), Katz's resigning his employment was not a *detrimental* change of position; he would have been without a job in any case.

On appeal, the decision was reversed by the Missouri Court of Appeals, which ordered judgment for the plaintiff. Rejecting the defendant's argument that Katz had not detrimentally relied, the court held that even if the defendant could have fired Katz whenever it chose, nevertheless it had not done so, electing instead to negotiate patiently with him for more than a year until it obtained his voluntary retirement. Citing earlier cases in Missouri and elsewhere,²⁹³ the court concluded that Katz indeed had detrimentally relied, so that injustice would result if Danny Dare's promise were not enforced.

Were the elements of section 90 satisfied in *Katz*? It depends in part on whether one accepts the defendant's evidence that Katz would in fact have been fired (with no retirement benefits at all, presumably) if he had refused to retire voluntarily. The trial court apparently believed this testimony; the appellate court, one suspects, did not, and maybe we don't either. After all, Shopmaker never was able to bring himself to fire Katz—probably because of the family relationship, plus perhaps a recognition that Katz's physical infirmities stemmed from loyal service to Danny Dare.²⁹⁴ If the company wouldn't in fact have retired him involuntarily, then Katz really did rely detrimentally on its promise when he resigned—he gave up a job he otherwise could have kept.

But suppose Shopmaker was telling the truth—his patience exhausted, he really would have fired Katz, brother-in-law or no. Does that negate a recovery by Katz under section 90? The company argued that it should, because Katz's retirement in those circumstances was not detrimental. But section 90 itself imposes no such requirement of "detriment."²⁹⁵ What it *does* explicitly require is that the

293. The court discusses at length *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959). Strikingly similar to illustration 2 to RESTATEMENT (FIRST) section 90, *Feinberg* was in turn used as the basis for illustration 4 to Restatement (Second) section 90. See RESTATEMENT (SECOND) § 90 reporter's note. The court also relies on *Trexler's Est.*, 27 Pa. Dist. & Co. Rep. 4 (1936).

294. In that respect the *Katz* case bears some resemblance to the famous "falling block" case, *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935).

295. In the Restatement (First), section 90 did require that the plaintiff promisee's change of position be "definite and substantial." See *supra* notes 31-2 and accompanying text. Clearly Katz's resigning his job was a definite action. The defendant might argue that it was not "substantial," if Katz would have been fired anyway. But in light of the

plaintiff's change of position be such that "injustice" will result if the promise is not enforced. Here that question is easily answered. Understandably reluctant to fire Katz, the Danny Dare officers made a promise to Katz to induce him to resign voluntarily. They got what they wanted. He resigned. Will injustice result if they don't keep their promise? Yes, because when one party proposes a bargain to another, and the other performs its side of that bargain, justice requires that the first party should render its performance in return—or compensate the other party for its failure to perform. All the Fuller & Perdue "remedial interests"—expectation, reliance and restitution—seem to unite in favor of some degree of enforcement.

When *Katz* is viewed in that light, it is evident that although the case was decided on the basis of promissory estoppel, it could just as well be explained as a half-completed bargained-for exchange. Danny Dare made an offer (probably for a unilateral contract); Katz accepted its offer (by doing the act called for), and earned the promised return.²⁹⁶ Bargain rhetoric identifies the crucial elements as offer, acceptance, and consideration; promissory estoppel rhetoric identifies the elements as promise, foreseeable reliance, and injustice. In *Katz*, is one way of describing the case more correct than the other? The bargain version may be more "correct" if some rule of contract law etiquette requires bargain analysis to be used whenever both are equally applicable. And indeed, many courts and commentators appear to take that position. According to them, promissory estoppel analysis should be employed if *and only if* conventional bargain analysis fails to yield enforcement.²⁹⁷ But, as Jay Feinman has correctly pointed out,²⁹⁸ there is no obvious reason for this ranking, other than a historical one. Both ways of telling the story of *Katz v. Danny Dare, Inc.* are accurate, the two versions just stress different things in justifying the outcome.

company's evident desire to get Katz to go gentle into his good night, if that could possibly be achieved, Katz's giving Danny Dare his voluntary resignation could arguably have been a "substantial" action for Katz—at least it appears to have been substantial from Danny Dare's point of view. Cf. the quotation from Professor Farnsworth *supra* note 287.

296. The opinion nowhere indicates whether Katz also attempted a conventional breach-of-contract suit, or if he did, what happened to it along the way.

297. See, e.g., *Youngman v. Nevada Irrigation Dist.*, 449 P.2d 462, 469 (Cal. 1969); *Wagner Excelllo Foods, Inc. v. Fearn Int'l, Inc.*, 601 N.E.2d 956, 964 (Ill. App. Ct. 1992); *LeStrange v. Korowothy*, No. 94046929S, 1997 WL 707101 (Conn. Super Ct. Nov. 4, 1997); Benjamin F. Boyer, *Promissory Estoppel: Principle From Precedents: II*, 50 MICH. L. REV. 873, 888 (1952) (describing reliance-based recovery as a necessary but secondary basis of recovery). See also Metzger & Phillips, *supra* note 49, at 508 (discussing the limitations of the standard view of promissory estoppel in which it acts only if classical contract doctrine does not yield the desired result).

298. See *supra* text accompanying note 171.

The problem that F & M and others have with fitting cases like *Katz* into a promissory estoppel mold is that we contracts teachers and writers traditionally conceptualize (and teach) the sort of reliance that triggers section 90 as being “unbargained-for.”²⁹⁹ We assume that other rules will protect *bargained-for* reliance—and usually they will. But in cases like *Katz*, reliance and bargain overlap. The promisee’s reliance is not merely foreseeable but is actually the bargained-for price of the promisor’s performance. In such cases, one’s sense of injustice doesn’t particularly demand that the reliance be “detrimental” to the promisee in some substantial economic sense, because the promisor has had the benefit of his bargain—he has gotten what he specified as the price of his promised performance.

In these cases of reliance/bargain overlap—which include not only *Katz* but many of the cases discussed by F & M³⁰⁰—it seems to me both understandable and appropriate for courts to use the rhetoric of promissory estoppel. It describes such cases just as accurately as does the bargained-for-exchange analysis, and it does two things that bargain theory does *not* do. It focuses our attention on the degree to which the promisee actually took action on the strength of the promise, and it allows—nay, requires—us to talk about justice.

The preceding discussion addressed cases in which there was at least a change of position by the promisor in response to the promise, albeit possibly not a “detrimental” one. There is a second type of “non-reliance” case, in which some post-promise change of position does take place, but that action may not be seen as “reliance” because it apparently would have happened anyway. A case of that sort, which contrasts neatly with the *Katz* case discussed above, is *Hayes v. Plantations Steel Co.*³⁰¹ Plaintiff Edward Hayes had been employed by defendant for 25 years when he announced his intention to retire, effective in six months. Shortly before his retirement was to take effect, one of defendant’s officers assured Hayes that the company “would take care” of him after retirement. And indeed the company did pay him a pension for four years, but payments were stopped after financial conditions worsened and ownership of the company changed.³⁰²

299. See, e.g., MURPHY ET AL., *supra* note 247, at 152 (“Promissory Estoppel: Promise Plus Unbargained-for Reliance”). Of course, promissory estoppel when employed to overcome noncompliance with a formal requirement—indefiniteness, lack of writing, etc.—is likely to be founded on the plaintiff’s actions in performance of the asserted agreement, actions which (if the plaintiff’s story is believed) indeed were bargained for.

300. See Farber & Matheson, *supra* note 61, at 907 n.18.

301. 438 A.2d 1091 (R.I. 1982).

302. At the time of Hayes’s retirement, Plantations Steel was closely held by two families, the Mainellis and the DiMartinos. By the time Hayes’s payments ceased four years later, a dispute had arisen, resulting in the DiMartino family buying out the Mainel-

Suing for continuation of the payments, Hayes was successful at the trial level, but on appeal to the Rhode Island Supreme Court the decision was reversed. Since Hayes had already communicated his intention to resign when the company's commitment to him was expressed, the court held, his retirement could not constitute bargained-for consideration. Nor could it be a sufficient change of position to constitute detrimental reliance, for essentially the same reason. The decision to retire preceded the company's promise, and therefore could not have been made in reliance on that promise.

On just the facts stated above, *Hayes* appears to be a good candidate for drawing such doctrinal lines. Even assuming that the defendant did make a promise sufficiently definite for enforcement (either on a contract or an estoppel basis),³⁰³ that promise was made after the plaintiff decided to retire, so it could only be, at most, "past consideration"—i.e., no consideration, under conventional bargain rules.³⁰⁴ Similarly, the act of retiring could not have been a change of position induced by a promise that came later. No exchange, no reliance, no recovery—no problem.

But there is a problem here, nevertheless. The trial court ruled for Hayes. Why? In the Supreme Court's opinion, there is an indication that the plaintiff's case may not have rested merely on the defendant's assurance, referred to above. Hayes testified that although he wished to retire because he had worked for 51 years, "he would not have retired had he not expected to receive a pension."³⁰⁵ Since the trial court held for plaintiff Hayes, it may well have accepted the truth of that testimony in reaching its decision.³⁰⁶ Such an expectation would presumably have been based either upon earlier promises or statements made to Hayes himself, or on the company's treatment of other retired employees, or perhaps a combination of the two. How

lis. The officer who promised Hayes he would be taken care of was Hugo Mainelli, a member of the departing family. See *id.* at 1093.

303. Compare the well-known early case of *Plowman v. Indian Refining Co.*, 20 F. Supp. 1 (E.D. Ill. 1937), in which the defendant's alleged promise to pay retirement benefits was denied (along with the officer's authority to make any such promise). The court in that case never decides the factual issue, because it disposes of the case on a lack-of-consideration ground.

304. Conceivably, a court determined to enforce in *Hayes* could have posited at least a theoretical possibility that the plaintiff might have retracted his decision to retire up to the point when it actually took effect, in which case his forbearing to do so could have been at least a technical detriment, sufficient to satisfy the consideration requirement.

305. *Hayes*, 438 A.2d at 1093.

306. That fact may not have been crucial to its decision, however, since the trial court held that Hayes's act of retiring could be consideration for Mainelli's promise as well as justifiable reliance upon it; if that promise is seen as the basis of defendant's obligation, then earlier events may not appear material.

might such additional facts—the possibility of which is not directly addressed by the Supreme Court in its opinion³⁰⁷—affect one's view of the case?

For the bargained-for consideration analysis, the additional facts would at least have complicated the case, whether or not they would have been sufficient to change the outcome. To the extent that classical contract law might regard the defendant's express post-retirement promise as too indefinite to enforce, evidence of the defendant's consistent payment of benefits to other retired workers could have supplied some parameters for the promised performance.³⁰⁸ And if the words and conduct of the defendant taken together added up to at least an implied-in-fact promise made *before* the plaintiff elected to retire, then both his continued employment and his eventual retirement could have been treated as consideration for that implied promise, sufficient to make it enforceable.

From the viewpoint of promissory estoppel, liberally applied, how might Hayes fare if his reasonable expectation of a retirement benefits actually arose before he communicated his decision to retire? A number of observations can be made. First, if the company's earlier words and/or conduct did in fact lead Hayes to believe he had already been assured him of retirement benefits, those assurances would in many courts be more readily seen as a "promise" for section 90 purposes (a "commitment") than as an "offer" in the bargain sense. Second, Hayes's decision to retire and his forbearing to seek other employment could both be seen as reasonable (and foreseeable) actions in reliance on that implied promise.³⁰⁹ Third, under section 90 it would not be necessary for Hayes to establish that his con-

307. The court does at one point state: "Although Hayes may have had in mind the receipt of a pension when he first informed Plantations, his expectation was not based on any statement made to him or on any conduct of the company officer relative to him in January 1972." *Hayes*, 438 A.2d at 1095 (emphasis added). The court thus does not address the possibility either that *earlier* communications to Hayes could have taken place, or that his expectation of a pension may have been based on the company's prior treatment of other non-union employees. We are told at one point that Plantations had no "formal provision for a pension plan" for its non-union employees such as Hayes. *Id.* at 1093.

308. By the time the dispute arose, defendant had made four annual payments to Hayes of \$5,000 each. The trial court took those as establishing the otherwise indefinite term of defendant's promise to Hayes. *See id.* at 1094. A pattern of similar payments to other employees would have further supported both the general credibility of Hayes's story and his claim to a specific annual sum.

309. The trial court is said to have "held" that Hayes refrained from seeking other employment in reliance on the promise of retirement benefits. *See id.* at 1094. Nevertheless, the Supreme Court brushes that possibility aside, stating that "Hayes left his employment because he no longer desired to work. He was not contemplating other job offers or considering going into competition with Plantations." *Id.* at 1095.

tinued service or his eventual retirement were intended by the company to be the "price" of its assurance of a pension. They need only have been rendered by Hayes in the belief that the commitment existed and would be honored.

Those are all ways in which promissory estoppel has been traditionally more "flexible" than classical bargain doctrine. If a court addressing the *Hayes* case were to apply the "Stage Four" variety of promissory estoppel that Professor Eric Holmes describes,³¹⁰ taking a personalized, Equity-style approach to *Hayes*, it could presumably take into account many factors. Some of those seem potentially to favor the plaintiff: What did the defendant do or say to Hayes or its other employees that led them to expect retirement benefits? What did the defendant get out of that, in terms of employee behavior or at least employee morale? Why did defendant's officer choose, on the brink of Hayes's retirement, to renew its assurance that he "would be taken care of"?

But some questions could elicit answers that might paint the defendant in a more sympathetic light. Why did the defendant cease its payments to Hayes? Was it truly financially unable to keep them up? If Hayes was only one of many retired employees, did the defendant treat them all equally, and if not, why not? When the DiMartino family bought out the Mainellis' interest in Plantations Steel,³¹¹ were the new owners ignorant of—or even misled about—the dealings that the Mainellis had with Plantations's employees, including Hayes?³¹²

Hard-nosed bargain theorists will perhaps argue that the seemingly endless number of such questions that might be asked serves only to strengthen the primacy of bargain theory in such cases. The new owners of a company like Plantation Steel should be able to acquire that enterprise as a package with confidence that if there are any enforceable obligations to employees like Hayes, those are reflected in written, signed documents, clearly and unambiguously stated, with merger-clause protection against extrinsic, potentially trumped-up claims like this one. This is not a weak argument; it has

310. See Holmes, *supra* note 19, at 292-97; see *supra* notes 248-51 and accompanying text.

311. See *supra* note 302.

312. The facts stated in the court's opinion are consistent with the possibility that the DiMartinos were innocent or even misled, but they do not particularly suggest it. I raise that possibility here because the equities in favor of innocent third parties as defendants seem to me to be considerably stronger than they would be against a defendant who was also the original promisor, still in control of the enterprise. If Mainelli, the promisor, had been and remained a sole proprietor of the Plantations Steel business, then we would have merely another "Gold Watch" case. See Knapp, *supra* note 52, at 945-48 (discussing a series of hypothetical cases put in *Farnsworth, Contracts*).

been decisive in many cases and will be in many more. But the price of a government of laws is—should be—submission of all actors to a legal system empowered not only to enforce the Law, but to do Equity.

In *Hayes*, a full weighing of the equities may require addressing one of the most basic issues of legal analysis: When one of two innocent parties must suffer because of the wrongdoing of a third, on what principled basis can we choose between them? If assurances of a pension were made to Hayes over the years by then-officers of the defendant, but the present owners of Plantation Steel truly were ignorant of that fact when they bought the business, on whom should the burden fall? On the one hand, enforcing an informal and unwritten promise has the potential for surprise and hardship to the defendant's new owners, ignorant of that promise's existence. On the other hand, the impact of non-enforcement on the plaintiff is severe. A court inclined to place a high value on formality might rule in favor of the defendant. To counter that factor, a court more concerned with "relational" values might point out that if the new owners of the defendant corporation were concerned about unknown and undisclosed obligations, they could have bargained for an indemnity against such liability—as perhaps they did.³¹³

The cases just discussed are examples of situations where the post-promise "reliance" is perhaps equivocal—maybe not truly "detrimental," maybe not "induced" by the promise—but at least it exists. The harder question remains: Should promissory estoppel be employed by courts or attorneys in cases where there has been really, no kidding around, *really* no reliance? Not cases like *Katz*, where the

313. It should be noted here that Hayes also might have fared better under several of the approaches earlier discussed:

a) Presumably the promise made to Hayes by Mainelli could have been binding under the F & M "economic activity" rule. See *supra* notes 75-94 and accompanying text. Hayes would still have had the burden of showing that the promise was really made, was definite enough to enforce, and was sufficiently authorized by the defendant, but it appears that the trial court in effect did answer all these issues in Hayes's favor.

b) Since Hayes and Plantations were "enmeshed" in an existing long-term relationship, Kostritsky's "barriers to bargain" analysis suggests an appropriate role for promissory estoppel here. See *supra* notes 97-103 and accompanying text. Under that approach, Hayes's failure to insist on a more formal structuring of his retirement arrangement could be viewed as the result of those factors—as in fact it may well have been—so that application of promissory estoppel would be particularly appropriate.

c) Having abandoned such notions as consideration and reliance, what would Feinman do with this case? Hayes couldn't have been treated any worse by Feinman's "social norms" of "mutuality, solidarity and power" than he was by the Rhode Island Supreme Court's classically neoclassical approach. See *supra* notes 188-98 and accompanying text. As suggested in the text above, the "relational" approach favored by Feinman and others seems well-suited to this case.

plaintiff performed exactly as the defendant expected and hoped he would on the strength of its promise. And not cases like *Hayes*, where in the circumstances perhaps an implicit pre-reliance promise could and should have been recognized. But cases where the promisor reneges at a point where there has been literally no change of position of any kind by the promisee. As others have pointed out,³¹⁴ such cases are rarer than we might imagine.³¹⁵ But they do exist, and—particularly where the promise was completely gratuitous, not made in an exchange context—there may well be a potentially remediable injury at least to the plaintiff's expectation interest, an injury which the plaintiff cannot otherwise mitigate.

Does promissory estoppel have a role to play in such cases? In a sense, that's like asking if the submarine has a role in interplanetary travel. Promissory estoppel by its nature requires at least some change of position on the part of the plaintiff, some action or forbearance on the strength of the promise. Even if one quarrels with some of the F & M case analyses, one may still accept their underlying premise: In a case where there truly has been no change of position induced by the promise, there is no proper role for promissory estoppel, and courts that do employ it in such cases are insufficiently explaining their decisions.

F & M have proposed an "economic activity" rule for some such pure-expectation cases.³¹⁶ Seconding that proposal, Barnett would add another rule justifying liability on the basis of mere intention to be legally bound, as manifested in various ways.³¹⁷ Other commentators have entertained the notion that some promises should be enforced just because they are made and broken, without regard to either "consideration" or "reliance" in the conventional sense.³¹⁸ All of that is interesting and creative, and it may now or at some future point correspond to how courts actually behave (in terms of outcomes reached). But it seems to have little or nothing to do with protecting actual reliance, or with "promissory estoppel." If the courts do persist in talking about promissory estoppel in such cases, it's probably because in our system they have to say *something*, and "promissory

314. See, e.g., Atiyah, *supra* note 52, at 211-12.

315. If any appreciable amount of time has passed since a promise was made, there is the possibility either that the promisee may already have taken some action, or at least that she may have forborne taking some action which she otherwise would have taken (if the promise had never been made, or if it had been sooner repudiated). So the completely-unrelied-on promise is likely to be a promise that is repudiated virtually as soon as it is made. Such quick retractions are probably rare, but certainly not unheard of.

316. See *supra* text accompanying note 75.

317. See *supra* text accompanying note 216.

318. See, e.g., Kull, *supra* note 219.

estoppel" may seem to be the best available rationalization for a result that demands to be reached.

B. Non-Liability Despite the Presence of Reliance

Having considered the problem of promissory estoppel without reliance, let us move to the complementary question: How and why do we have reliance without promissory estoppel? Superficially, at least, this second promissory estoppel conundrum would appear likely to cause us much less trouble than the first one. From the start, section 90 has prescribed a set of requirements for reliance-based recovery. These include: a promise by the defendant; the reasonable foreseeability of reliance; and actual reliance³¹⁹ by the promisee.³²⁰ To those elements, the cases and commentaries have added two others: The reliance must in some sense have been "detrimental" to the promisee³²¹ and the reliance must have been "reasonable."³²² Given this list of requirements, it should not be surprising that recovery has been denied in many cases where some form of reliance—some change of position by the promisee—is demonstrably present. If some other element is missing, then recovery will still be properly denied, reliance or no. Thus, no recovery would be available in cases where the promisor's commitment was not clearly expressed³²³ or not made by someone with authorization to do so,³²⁴ or where the promisee's reliance was deemed unforeseeable or unreasonable in the cir-

319. In the Restatement (First's) formulation of section 90, "definite and substantial" reliance. Cf. RESTATEMENT (SECOND) § 90 cmt. b (listing the "definite and substantial character" of the reliance as one factor (along with many others) to be weighed in making the decision to enforce).

320. Or, in the Restatement (Second) formulation of section 90, by a third party.

321. This element has been discussed in the text above. See *supra* text accompanying notes 285-89.

322. Section 90 does in its text (both versions) state that the promise should be one "which the promisor should reasonably expect to induce action or forbearance," but this reference to "reasonableness" seems to refer to the element of foreseeability, not the nature of the reliance itself. However, the section is presently captioned "Promise Reasonably Inducing Action or Forbearance," which may be intended to suggest that the action or forbearance must be "reasonable" in the circumstances, not just "reasonably foreseeable." The drafters presently appear to so interpret the section. See RESTATEMENT (SECOND) § 90 cmt. b (listing "the reasonableness of the promisee's reliance" as another element to be considered in deciding whether enforcement is appropriate under that section, in addition to the element of foreseeability).

323. See, e.g., *Liberty Heating & Cooling, Inc. v. Builders Square, Inc.*, 788 F. Supp. 1438 (E.D. Mich.), *appeal dismissed*, 968 F.2d 1215 (6th Cir. 1992).

324. See, e.g., *Reamer v. United States*, 532 F.2d 349 (4th Cir. 1976), discussed in Farber & Matheson, *supra* note 61, at 918.

cumstances.³²⁵

Obviously, these elements contain a lot of elbow room for judges or juries to exercise discretion. Rules that turn on the "reasonableness" of reliance or its "reasonable foreseeability" are not exactly the hard-edged, maximally predictable rules that contract classicists profess to prefer, and whether a given communication amounts to a "promise" is often difficult to decide. But then, many rules with impeccable classical credentials are equally indeterminate at the margin. The doctrine of consideration is notorious for its manipulability.³²⁶ Whether an "offer" was indeed made has given many a law student fits over the years precisely because of the fuzziness of the boundaries.³²⁷ Even the supposedly mechanical "mailbox" rule is susceptible to purposive application.³²⁸ Were its elements of "reasonableness" the worst that promissory estoppel had to offer in the form of indeterminacy, one would be tempted merely to invoke the proverbial pot and kettle, and move on.

But there is more to the problem than that. Section 90 also contains a requirement that the situation be such that "injustice can be avoided only by enforcement of the promise."³²⁹ From the wording of the section, it appears that the reference to injustice is not simply a verbal summation of all the elements that have been listed so far. Rather it is an additional element, distinct from the others. Even if a promise has induced foreseeable, substantial and reasonable reliance, meeting all the specific tests imposed by section 90, the final question must still be answered. Will injustice result from its nonenforcement? To the drafters of section 90, this is an open question—the answer will often be yes, but it can be no.

Here if anywhere is the heart of the indeterminacy of section 90, of which Jay Feinman is perhaps the most vocal but certainly not the only critic.³³⁰ If justice—or, more precisely, *injustice*—is the ultimate standard, how can we predict the outcome? And if outcomes are unpredictable, can promissory estoppel do the job we usually expect

325. See, e.g., *RCM Supply Co., Inc. v. Hunter Douglas, Inc.*, 686 F.2d 1074 (4th Cir. 1982).

326. See K.N. Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863, 866 (1941).

327. Compare *Moulton v. Kershaw*, 18 N.W. 172, 174 (Wis. 1884) (holding "offer" is not an offer, but only invitation to deal) with *Fairmount Glass Works v. Grunden-Martin Wooden-Ware Co.*, 51 S.W. 196, 197 (Ky. 1899) (holding price "quote" is not merely a price quotation, but an offer).

328. See RESTATEMENT (SECOND) § 63 cmt. b (inviting courts to manipulate interpretation of offer so as to avoid application of "mailbox" rule to cases involving lost acceptances).

329. See *id.* at § 90.

330. See generally Feinman, *supra* note 170.

contract law to do, which is to provide not merely an *ex post* compensation system for injury, but an *ex ante* basis for transactional planning?³³¹

Putting the question thus may seem to overlook the fact that traditional contract law is, after all, not completely unconcerned with justice. But traditional contract law tends to address the issue of justice in an across-the-board fashion. When the elements of offer, acceptance, consideration and unexcused breach are present, liability is automatic. In such cases, we don't have to specifically address issues of morality or fairness, because the contract law system has already decided—however shrouded in mist the origins of that decision may be—that justice will be served by some measure of enforcement in such a situation.³³²

To be sure, both conventional contract principles and promissory estoppel may agree on some examples of injustice. Thus, in our earlier discussion of the overlap between the two, it was suggested that when a proposed exchange has been performed on one side, justice could appear to call for some form of enforcement of an obligation to perform the return performance, whichever approach was being employed. But unlike conventional contract analysis, application of promissory estoppel as expressed in section 90 requires that the issue of injustice be specifically addressed.

This does not preclude the possibility that a given type of promissory estoppel case, recurring in substantially the same form, will tend to be resolved in the same way, so that eventually a "rule" is discernible in the decisions, and the discussion of injustice in later cases is perfunctory at best. Thus, in the line of cases following Justice Traynor's seminal opinion in *Drennan v. Star Paving Co.*,³³³ court after court has applied promissory estoppel so as to provide a remedy where a sub-bidder revokes its bid after a general contractor has relied on that sub-bid in preparing and submitting its bid on the general contract.³³⁴ Although Traynor's opinion carefully pointed out factors that might cut against the application of promissory estoppel in similar cases,³³⁵ courts generally have accepted Traynor's explanation of

331. The need to provide a basis for transaction-planning is conventionally seen as a hallmark of contract law, although modern, economics-based tort law assumes that rational economic actors in approaching transactions will take account of the legal rules in this area as well. See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

332. This of course does not reach the very real problem of what form that enforcement will take.

333. 333 P.2d 757 (Cal. 1958).

334. See, e.g., *Montgomery Indus. Int'l, Inc., v. Thomas Constr. Co.*, 620 F.2d 91 (5th Cir. 1980) (Texas law). See generally KNAPP & CRYSTAL, *supra* note 221, at 239-44.

335. These included the possibility that the defendant's bid would be clearly based on

why the equities in this situation tend to favor the general contractor, even though (as numerous commentators have pointed out³³⁶) there are institutional arguments on the other side as well.³³⁷ In section 87(2), the Restatement (Second) attempts to elevate that line of cases to a higher level of abstraction, potentially applicable in cases not involving contractor-bidding.³³⁸ But that attempt has not been notably productive of additional applications.³³⁹ Even though the reliance-based rule of section 87(2) is indeed consistent with the *Drennan*-type cases, it apparently fails to capture the particular aspects of that case which made its decision persuasive in similar cases.

To further consider how the question of injustice might be addressed in the area of reliance protection, let us consider a case in which promissory estoppel was advanced but rejected as a basis for protecting an offeree against the revocation of an offer, *Berryman v. Kmoch*.³⁴⁰ Plaintiff Berryman, the owner of Kansas farmland, made a written offer in June to sell a tract of farmland to Kmoch, a Colorado real estate broker. The writing (which the court refers to as an "option agreement") was apparently specific about all or most of the terms of sale,³⁴¹ and stated that Berryman did "hereby grant" to Kmoch "an option for 120 days after date," in return for "\$10.00 and

error or expressly revocable, and the possibility of unwarranted delay or pre-acceptance "bid-shopping" by the plaintiff. See *Drennan*, 333 P.2d at 759-61. In *Lahr Construction Corp. v. J. Kozel & Son, Inc.*, 640 N.Y.S.2d 957 (N.Y. Sup. Ct. 1996), a New York trial court judge expresses strong doubt as to whether the *Drennan* rule has actually become New York law, but ultimately concludes that the plaintiff's reopening of negotiations with the defendant precludes application of promissory estoppel to hold defendant to its bid.

336. See, e.g., Joe C. Creason, Jr., Note, *Another Look at Construction Bidding and Contracts at Formation*, 53 VA. L. REV. 1720 (1967); see generally, Michael L. Closen & Donald G. Weiland, *The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel and Other Theories to the Relations Between General Contractors and Subcontractors*, 13 J. MAR. L. REV. 565 (1980).

337. Professor Alfred S. Konefsky has recently published a fascinating examination of the *Drennan* case in its historical context. See Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169 (1997).

338. The formulation is as follows:

An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

RESTATEMENT (SECOND) § 87(2).

339. See Margaret N. Kniffin, *Innovation or Aberration: Recovery for Reliance on a Contract Offer, as Permitted by the New Restatement (Second) of Contracts*, 62 U. DET. L. REV. 23 (1984).

340. 559 P.2d 790 (Kan. 1977).

341. Terms expressly covered included price, inclusion of growing crops, water rights and irrigation equipment, and the time for delivery of possession. See *id.* at 792.

other valuable consideration.”³⁴² In late July, Berryman by telephone “asked to be released from the option agreement,” but “nothing definite was worked out between [Berryman and Kmoch].”³⁴³ In August, Kmoch “decided to exercise the option,” but was informed³⁴⁴ that Berryman had already sold the land to someone else. After “unproductive” conversations with Berryman, Kmoch recorded the option agreement in the land records of the county where the land was located in Kansas.³⁴⁵ Berryman then brought a declaratory judgment action to void his agreement with Kmoch (in order to remove a cloud on his vendee’s title, presumably). Summary judgment for Berryman was granted by the trial court on the ground that the “option agreement” was merely an offer made without consideration, hence was revocable at any time before acceptance, and in fact had been effectively revoked by the offeror in July, before Kmoch’s attempted acceptance.³⁴⁶ On appeal to the Kansas Supreme Court, that ruling was affirmed.

Along with the requirement of consideration, the free revocability of an offer is one of the touchstones of classical contract law, so much so that an offer will remain freely revocable even if it was stated to be “irrevocable,” or the offeror expressly promised not to revoke it for a period of time. Assuming that the language “grant unto you . . . an option” should be understood as the making of an expressly irrevocable offer, that was exactly the situation presented in *Berryman*. By 1977 (the date of that decision), this principle of free revocability had been circumscribed by a number of exceptions; none of those, however, was held to be applicable in that case.

The most obvious limitation on free revocability—which Kmoch in his drafting of the agreement³⁴⁷ had apparently sought to invoke—is the creation of a true “option contract,” the offeror’s promise of irrevocability made binding by the receipt of consideration. The Berryman/Kmoch agreement recited the payment of ten dollars as consideration for Berryman’s grant of an option. If that sum had in fact been paid, an option contract would have resulted, protecting Kmoch for 120 days from the prospect of Berryman’s revocation.³⁴⁸ But the

342. *Id.*

343. *Id.* at 793.

344. Not by Berryman, but by a federal land bank representative. *See id.*

345. *Id.*

346. *Id.* at 792.

347. The court indicates that the option agreement was drafted by Kmoch, who was a real estate broker. *See id.* at 792.

348. The courts generally appear willing to enforce option contracts on the basis of very small amounts of money as consideration. *See, e.g., Keaster v. Bozik*, 623 P.2d 1376 (Mont. 1981) (five dollars as consideration for one-year option to purchase land for

money never did change hands, and the so-called "option agreement" therefore did not result in the creation of an option contract. Even if, as Kmoch contended, he did expend time, money and effort attempting to find investors to join with him in purchasing Berryman's land, those actions were not deemed by the court to have been the "price" of Berryman's promise not to revoke, and hence could not under conventional bargain theory serve as the consideration to bind an option contract.

But there are other avenues to irrevocability, besides the actual payment of consideration. In section 87(1)(a), the Restatement (Second) proposes a rule making a signed, written offer irrevocable where it merely "recites a purported consideration," provided the offer proposes a fair exchange to be performed within a reasonable time.³⁴⁹ The rule is justified on the basis that the recital of consideration is merely intended as a kind of legal formality, which in this context should be given legal effect.³⁵⁰ Assuming the stated purchase price was a fair one for Berryman's property,³⁵¹ the requirements of section 87(1)(a) appear to have been met in *Berryman*. But, although it elsewhere quotes and relies on the Restatement (Second) the appellate court in *Berryman* never addresses the possible application of that rule.³⁵²

Had *Berryman* involved an offer to buy or sell goods, U.C.C. section 2-205 might have been applied in Kmoch's favor to protect him against revocation by Berryman, since that provision does create short-term irrevocability (for up to three months) in the case of written, "firm" offers. But that rule only applies where the offeror is a merchant, and it requires a separate signing (or at least initialing³⁵³) where the form was "supplied" by the offeree. Both those elements are problematic in *Berryman*. Although Kmoch as a real estate bro-

\$200,000).

349. See *supra* note 221 (discussing that rule in the context of Professor Barnett's proposed rules of liability).

350. Assuming that the agreement in *Berryman* would be regarded as having been made in the course of economic activity, it appears that the option agreement would have been binding on the prospective seller Berryman under either the F & M "economic activity" rule or the Barnett "intention to be bound" rule. See *supra* text accompanying notes 75 and 216.

351. The court in *Berryman* never tells us either the option price or the amount for which Berryman sold the land, so we cannot compare them.

352. Relatively few courts appear to have adopted the rule of Restatement (Second) section 87(1)(a), so even if it had been addressed in *Berryman*, it might well have been rejected. Compare *Smith v. Wheeler*, 210 S.E.2d 702 (Ga. 1974) (recital of consideration makes option agreement enforceable) with *Lewis v. Fletcher*, 617 P.2d 834 (Idaho 1980) (contra).

353. See U.C.C. § 2-205 cmt. 2 (1995).

ker would clearly be deemed a "merchant" in the U.C.C. sense (although not of goods, of course), Berryman might not.³⁵⁴ Moreover, Kmoch is said to have drafted the agreement which Berryman signed. Although the rules of the U.C.C. are sometimes applied "by analogy" in non-Code cases, section 2-205 does not appear to have been even noted by the parties or the court.

From the various rules discussed above, it is clear that the principle of free revocability—which is after all, merely an application of the principle of freedom *not* to contract—bends fairly readily to the principle of freedom *to* contract. Yet none of the exceptions so far discussed overcame Berryman's freedom of revocation. What about promissory estoppel? Although the court in *Berryman* discusses the possible application of that principle, there is no indication in the opinion that the court specifically addressed either the *Drennan* line of cases or the possible application of Restatement (Second) section 87(2). The court does consider general promissory estoppel,³⁵⁵ but declares (after a rather unsatisfactory and conclusory discussion) that it should not apply because the acts advanced as detrimental reliance were not reasonably foreseeable.³⁵⁶

As courts often do, the *Berryman* court has evident difficulty in sorting out its discussions of consideration and of promissory estoppel.³⁵⁷ In explanation of its decision on the promissory estoppel issue, the court asserts that Kmoch's actions in seeking other investors were not "acts which could reasonably be expected as a result of extending

354. See U.C.C. § 2-104(1) (1995) ("merchant" for some purposes includes one skilled in business practices).

355. The court quotes an earlier Kansas opinion, but the discussion generally mirrors the requirements of Restatement (Second) section 90. See *Berryman v. Kmoch*, 559 P.2d 790, 793-95 (Kan. 1977).

356. Most of the court's discussion concerns the possible presence of consideration. As for promissory estoppel, it declares:

The requirements are not met here Kmoch was familiar with real estate contracts and personally drew up the present option. He knew no consideration was paid for the same and that it had the effect of a continuing offer subject to withdrawal at any time before acceptance. The acts which appellant urges as consideration conferred no special benefit on the promisor or on his land. The evidence which appellant desires to introduce in support of promissory estoppel does not relate to acts which could reasonably be expected as a result of extending the option promise. It relates to time, effort and expense incurred in an attempt to interest other investors in this particular land.

Id. at 794. The absence of benefit-to-the-promisor should not of course have been fatal to the claim of promissory estoppel. Other issues raised by the court are discussed in the text which follows.

357. In his discussion of Kansas case law, Eric Holmes says merely that the court in *Berryman* did not apply promissory estoppel "based on special facts of case." Holmes, *supra* note 19, at 382 n.436.

the option promise.³⁵⁸ To one reader, at least, this is simply unpersuasive. Kmoch surely had to give some reason to justify asking for a four-month option period. It is implausible that he would not have discussed with Berryman some of the actions that Kmoch would be taking during those four months. On the other hand, two other factors discussed in *Berryman* seem to have been particularly influential with the court. One is the fact that the agreement was drafted by Kmoch, who was a real estate professional while Berryman was not; the other is the ease with which a true option contract *could* have been created (i.e., by paying the ten dollars). Kmoch made his own bed, the court is saying; let him lie in it.

Let us assume for the sake of this discussion that Kmoch's post-offer actions were undertaken in the reasonable belief that Berryman would honor his promise of an "option contract," and that—the court's assertions to the contrary notwithstanding—those actions indeed reasonably could have been (and quite possibly in fact *were*) foreseen by Berryman. On those assumptions, the case for promissory estoppel under either section 90 or section 87(2) would be made, so far as the particular elements are concerned: A promise³⁵⁹ not to revoke the offer;³⁶⁰ foreseeable and reasonable reliance.³⁶¹ But that's only half the story. The real issue in *Berryman* is the question of injustice. Did an injustice to Kmoch result when Berryman was allowed freely to revoke his offer and sell to another, without any liability to Kmoch?

In the eyes of classical contract law, justice or injustice are dependent on the existence of a contract. Where no contract exists, there is no injustice in failing to perform a promise. And the existence of a contract is in turn dependent on the mechanics of offer and acceptance: Where an offer has not been accepted, no contract exists; ergo, no injustice. Classically, the acceptance of an offer is like the flipping on of a light switch—where an instant before there was only a

358. *Berryman*, 559 P.2d at 794.

359. In this respect *Berryman* is stronger than *Drennan*, where the promise not to revoke was not express, but regarded by the court as implicit in the circumstances.

360. Presumably the agreement to create an "option" would have been so understood, even by someone who was not a real estate professional.

361. A possible problem lies in the timing of Kmoch's actions. It is not clear from the opinion whether the court treats the July telephone conversation between the parties as necessarily amounting to a revocation by Berryman, or whether termination of the power of acceptance only occurred when Kmoch learned from another source that Berryman had sold to another. The July conversation was apparently inconclusive enough that it might not have been an effective revocation; even so, it might have so alerted Kmoch to Berryman's change of heart that further reliance was plainly risky and therefore unreasonable, in which event the section 90 case might be held to depend on Kmoch's earlier actions exclusively.

potential exchange of energy, the exercise of a power of acceptance produces an instantaneous and full-powered connection, the contract. That never happened in *Berryman*, said the court, because revocation preceded acceptance.

But where the application of promissory estoppel is concerned, both the creation of a right and the entitlement to a remedy for its breach may be a gradual process—more like turning up a dimmer switch in a darkened room.³⁶² In the *Berryman* case, since the land had been sold (possibly to a good faith purchaser with no knowledge of the prior *Berryman-Kmoch* dealings), there may have been little or no chance for *Kmoch* to actually acquire the land by effectively accepting *Berryman's* offer. But he still might have been entitled to reliance damages (reckoned by his expenditures in investigating and promoting the deal) or even expectation damages (measured at least by the contract-market differential, and perhaps including not only incidental expenses but even lost profits) if his reliance had been deemed to trigger the promissory estoppel rule of either section 90 or section 87(2). And that would depend on whether the court's sense of injustice had been aroused.

Where did justice lie, and injustice lurk, in *Berryman*? Many of the factors in the case appear to jibe with the conventional classical outcome reached by the court. For one thing, Professor *Kostritsky's* "barriers to bargain" approach to promissory estoppel³⁶³ seems inapplicable here. *Kmoch*, the would-be buyer, was the professional real estate dealer, not *Berryman*, and it was *Kmoch* who supplied the text of the "option agreement" that *Berryman* signed.³⁶⁴ At one point *Berryman* expressed his desire to withdraw the offer, and *Kmoch* apparently resisted. *Kmoch's* actions in recording the agreement and attempting to exercise his option all took place after he knew of *Berryman's* sale to another, and presumably were done with the intention of clouding *Berryman's* title and setting up a lawsuit, in the hope either of derailing the sale to the other buyer or at least obtaining a profitable settlement to quiet title. Clearly *Kmoch* could, at the outset, have procured for himself a binding option contract if he wanted

362. The same analogy might of course be also applied to more modern notions of contract formation. See, e.g., U.C.C. § 2-204(2) (1995); see generally, Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

363. See *supra* text accompanying notes 97-103.

364. Whether or not this was a "form" is unclear; the option-granting clause has a boilerplate look to it, but the balance of the agreement apparently contained many provisions particular to their deal. Possibly it was a form with filled-in blanks, accompanied by attachments.

to, so why—one may well ask—should a court do for him what he failed to do for himself?³⁶⁵

And yet, and yet—all that is a little too easy. If, as the Kansas Supreme Court asserts, Kmoch was a savvy professional, who “knew that [the option agreement] had the effect of a continuing offer subject to withdrawal at any time before acceptance,”³⁶⁶ why in the world did he hold on to the ten dollars, thereby risking exactly the disappointing outcome that he got? Is it conceivable that Kmoch would spring for a plane trip to Kansas and back, but balk at spending ten bucks for a legally enforceable option? Not to me. It is far more plausible to assume that if he did consciously address the question, Kmoch expected that the option agreement *would* be binding, merely on the strength of its recital of consideration.³⁶⁷ Did Berryman need or want the ten dollars; was he aggrieved at its nonpayment? Again, this is highly unlikely; surely he regarded that sum as a mere “formality,” and was simply indifferent to the fact of non-payment. Indeed, one can easily imagine Kmoch, as he climbs into his rental car to begin the journey home, suddenly remembering and saying to Berryman, “Wait a minute, I forgot to give you the ten dollars!,” only to be told in reply, “Don’t be silly, my word is good. Buy yourself a drink on me at the airport.”

But what about the imbalance of expertise? Was Berryman just a naive hick, and Kmoch a city slicker? We really don’t know enough to answer that question. True, Kmoch was a professional dealer in real estate, and Berryman possibly a simple tiller of the soil. Berryman did, however, own 960 acres of land, land that was valuable enough to draw interest from as far away as Colorado and Nebraska. True, Kmoch did supply the agreement which Berryman signed. On the other hand, the language of that agreement was hardly obscure: “I hereby grant unto you . . . an option for 120 days after date to pur-

365. So stated, the argument against promissory estoppel here is intentionally evocative of Judge Learned Hand’s oft-quoted pronouncement in *James Baird Co. v. Gimbel Bros. Inc.*, 64 F.2d 344, 346 (2d Cir. 1933):

The contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures; and in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.

James Baird is, of course, the gauntlet which Hand threw down over the years for Justice Traynor to take up in *Drennan v. Star Paving*. Despite the minimal acknowledgment of the *James Baird* decision in Traynor’s *Drennan* opinion (a mere “cf.” cite), Professor Alfred Konefsky argues convincingly that Traynor was quite conscious of Hand’s opinion in *James Baird*, and intended his *Drennan* opinion as a reply to it. Konefsky, *supra* note 337, at 1220-35.

366. *Berryman v. Kmoch*, 559 P.2d 790, 794 (Kan. 1977).

367. Recall the rule of Restatement (Second) section 87(1)(a).

chase the following described real estate.” Shouldn’t we assume that Kmoch at least read it? And that if he did, he probably understood it? And what about the price for the land; do we have reason to think it was unfairly low? We do know that Berryman asked to be “released” from his agreement some six weeks or so later, which could indicate that he had gotten a higher offer. However, that fact also could indicate merely that he had gotten an offer as good as Kmoch’s (or nearly) from someone who was prepared to move immediately, instead of taking another two to three months to decide.

Answers to the above questions might reveal a different version of the case than assumed by the court, one in which Berryman appears not as the innocent dupe of a craftily manipulative Kmoch but as a self-seeking promise breaker, taking advantage of a legal loophole to avoid a commitment that he knew full well he had made. Even so, the basic question still remains: Is it unjust to deny Kmoch any compensation for Berryman’s breach of trust? Here again, we might want to learn more. How extensive and expensive were the actions Kmoch took? Were they actions that he would not have undertaken unless he had an effective commitment protecting him against revocation, and did Berryman understand that fact? Did Kmoch commit himself or at least involve himself with other potential investors to the extent that Berryman’s withdrawal was embarrassing and possibly even injurious to Kmoch in future dealings? Indeed, is it possible that Berryman even profited from Kmoch’s activities, by selling (either more quickly or for a higher price, or both) to someone who became aware of this opportunity as a *result* of those activities?

At this point, you may be thinking: Give me a break, okay? All of this agonizing over a possible promissory estoppel claim for a disappointed buyer simply imposes too much cost and uncertainty in an area where certainty could easily be achieved and such costs avoided. A firm denial of this buyer’s claim may deter the next one like it, saving everybody the cost of a useless lawsuit. In the future, would-be optionees like Kmoch will know they have to pay for an option (or at least they *should* know that), so if they don’t pay, we don’t have to feel sorry for them. Granting Berryman’s plea will also enable both him and his unnamed vendee to more quickly get on with their plans, whatever those may be.

For many, those arguments are probably so decisive that they could conclude the discussion. But all the factors that might persuade a court of equity to exercise its powers in favor of Kmoch via promissory estoppel are also factors that could impel a court to give Kmoch the benefit of a close call on some other ground of decision—the Re-

statement (Second) "recital of purported consideration" rule, say, or the possibility of finding a bargained-for consideration.³⁶⁸ Of all the possible grounds of decision (pro or con), only promissory estoppel expressly invites the court to consider the equities of the case—on both sides—and then to factor them explicitly into its decision.

Of course promissory estoppel is less efficient than some other alternate basis for decision-making, if efficiency is to be found in the avoidance of litigation and settlement costs. But that argument can prove too much. Viewed in that light, the only perfectly efficient legal rule would be a Draconian denial of all recovery, all the time—or, as summarized in Gilmore's *reductio ad absurdum* of Oliver Holmes's vision of the common law: "[I]deally, no one should be liable to anyone for anything."³⁶⁹

IV. Reliance Reassessed: The Prognosis for Promissory Estoppel

For at least a century—much longer than that, by Eric Holmes's account—various types of promise-reliance have received substantial, if sporadic, legal protection from American courts. For most of this century, such protection has often been accorded under the rubric "promissory estoppel." The two Restatements of Contracts have presented this doctrine as one of the core concepts of contract law, and countless numbers of courts have applied it in the resolution of legal disputes. Yet promissory estoppel remains even today the new kid on the contracts block, treated politely but coolly by some, derided by others, and usually picked last when teams are chosen.³⁷⁰ Presented by the Restatements as a rule (or collection of rules) that can be applied to reach appropriate case-decisions, promissory estoppel as we have seen has been viewed by some as a rationale often used to justify decisions that could and perhaps should be rested on other grounds. Ultimately, anyone seeking to preserve, protect and defend promissory estoppel comes up against the same questions: Why do we need it? What does promissory estoppel do for contract law that can't either be done just as well by better-established doctrines, or else happily done without?

We live in a time of transition, when much of life and of law is in

368. Cf. *Smith v. Wheeler*, 210 S.E.2d 702, 704 (Ga. 1974) (holding option enforceable on strength of optionee's promise to pay \$1.00, even though not paid; implicit promise to pay was sufficient consideration for irrevocability of offer); *Mack v. Coker*, 523 P.2d 1342, 1344 (Ariz. Ct. App. 1974) (holding buyer's efforts to obtain financing for purchase was consideration for seller's grant of option).

369. GILMORE, *supra* note 7, at 14.

370. See *supra* note 297.

a state of flux. No surprise there, we *always* live in a time of transition. Anyone who thinks otherwise hasn't lived long enough, or hasn't been paying attention. But there are times when we can delude ourselves into thinking that all or most of what we know and value has always been there, and always will be. The end of the twentieth century is not one of those times. Whether the tides are going out or coming in, the waters are visibly churning, in contract law as in other areas. In order to assess whether promissory estoppel can avoid being swept away, we must ask what, if any, functions that doctrine serves, and serves better than other bits of contract doctrine. Without claiming to have exhausted the list of possibilities, it seems to me there are at least three distinctive contributions made by promissory estoppel: It helps us to decide cases better; it helps us to understand cases better; and it helps us to understand ourselves better. These three possibilities will be addressed in order below.

A. Deciding Cases: Plugging the Doctrinal Holes

The commentaries and case-surveys discussed above indicate that promissory estoppel has often been applied in situations where, in earlier times, other doctrines might have been used to reach similar outcomes. It has been employed in such cases not necessarily because the plaintiff's reliance has been so overwhelmingly substantial or detrimental, but because there probably *has* been at least some reliance (albeit possibly intangible, and difficult to prove or quantify), and because the narrowed definition of consideration and the abandonment of the seal have restricted the ability of twentieth century courts to rest the imposition of liability on those other bases.

If the definition of consideration were broadened to incorporate the F & M "economic activity" principle, then business promises could in most cases be enforced on that ground alone, even though reliance might also be present (although if substantial reliance had obviously taken place, that factor might also be invoked to underscore the justice of the outcome). Alternatively, if Barnett's enforcement category of promises-made-with-apparent-intent-to-be-legally-bound were to be generally recognized, then many (though not all) business promises and many intra-family or donative promises (including many made to charities) would on that basis be enforceable *per se*, without any proof of promisee-reliance. If both of those expansions of doctrine were to take place, a large part of what promissory estoppel now does could and quite possibly would be done without ever mentioning promissory estoppel, and without any specific comment on the presence (or absence) of reliance.

But for many courts this appears to be a time not of revision but

of retrenchment. With all due respect to Farber, Matheson, Barnett, and the others (myself included) who have suggested new "Restatement" sections in this area, none of these *faux* Restatements—however persuasive their supporting arguments—has anything like the authoritative force of the real thing. Until a new Restatement of Contracts does appear, promissory estoppel will continue to protect many promisees in situations where other doctrines in their existing incarnations will not. And even if our notion of consideration were to be expanded as those commentators have recommended, courts would still in many cases face the question whether the presence of reliance should be protected. In addition, in applying our newly expanded concept of consideration we should even more squarely face the question of whether liability should be imposed in its absence.

The significance of the distinction between conventional contract and promissory estoppel is most apparent in cases where a promisor repudiates his promise—either denies making it at all, or declares his intention to break it—before any substantial reliance has occurred. If the promise was part of a consideration-supported exchange, our present system calls for its enforcement to the full extent of the expectation generated. If promissory estoppel would have been the only basis for its enforcement, however, the promisor's pre-reliance change of heart should be sufficient to avoid liability on the promise.³⁷¹

Suppose, though, that our notion of consideration were to be expanded as Farber, Matheson and Barnett have advocated. How should we treat a repudiating promisor whose promise is potentially enforceable on either an "economic activity" or "intent to be bound" basis? Since the arguments in favor of expanded liability generally stress the "reliability" of the promise and the appropriateness of enforcement without regard to reliance, such a promise under the Farber/Matheson/Barnett regime would become susceptible of enforcement as soon as the promise was made, change of heart or no change of heart. And such enforcement would presumably be full-fledged, expectation-based, "Johnny-and-the-car" liability, just as Y & T (and Williston) have advocated.³⁷²

Should the presence or absence of reliance be irrelevant under this new dispensation? Consider first the "economic activity" rule proposed by F & M. To the extent that such a rule would apply to

371. Post-repudiation reliance would not be protected either because it would be viewed as unreasonable or because its non-compensation would not be regarded as an injustice.

372. See *supra* text accompanying notes 158-62. Again, it must be remembered that the possibility of mitigating action could reduce the likelihood of substantial liability even if enforcement were potentially available. See *infra* text accompanying notes 374-77.

promises made by one party or the other in the course of performing an agreement already made, it resembles the U.C.C. approach to modification, stated in section 2-209(1): A modification of an existing contract needs no consideration to be binding. By removing the obstacle previously presented by the "pre-existing duty" corollary to the classical consideration doctrine, the Code in Article 2 did for modifications of sale-of-goods contracts what F & M would do for all economic activity. It made such agreements immediately and fully enforceable, without regard to whether they were "one-sided" or not.

So viewed, the F & M approach merely extends to the formation of all commercial contracts the modification rule of section 2-209(1). And indeed, many of the cases F & M use to illustrate their thesis could have been also analyzed as modifications of already existing agreements. But the rule suggested by F & M would apply also to initial promises, not merely to promises modifying agreements already made, and so would Barnett's intent-to-be-bound rule. Assuming those approaches were to become generally accepted law, the case for full enforcement would be clearest when the promise at issue falls into the double category of promise made in furtherance of economic activity, with apparent intent to be bound. If stated formally, an economic-activity promise satisfies both the F & M and the Barnett rules, and seems an ideal candidate for full enforcement. If stated informally, however, the issue of reliance might appear relevant to the decision of whether, or how, to enforce.

Take as an example *Universal Computer Systems, Inc. v. Medical Services Ass'n.*³⁷³ Plaintiff Universal, a computer supplier located in Westport, Connecticut, was preparing to submit a bid to supply computers to the defendant, a Blue Shield health insurance company. The bids were due to be submitted at the defendant's office in Harrisburg, Pennsylvania, by noon on a Monday. In a telephone conversation on the preceding Friday, Universal's president, Wilson, inquired of defendant's agent, Gebert, whether Gebert could arrange to have plaintiff's bid picked up at the Harrisburg airport on Monday morning. Gebert assured Wilson that Universal's bid would be picked up and delivered to the defendant in time to meet the deadline. By Monday morning, however, Gebert had changed his mind (probably because of an internal determination that government bidding regulations applicable to the contracting process made such an accommodation for one bidder improper). By the time Wilson was notified of this fact, it was too late for Universal to get its bid from the airport to defendant's office. Even though the bid would have been the lowest, it was not considered because it arrived late. Plaintiff

373. 628 F.2d 820 (3d Cir. 1980).

brought a federal diversity action against the defendant Blue Shield, seeking the profit it would have made on the contract to supply computers had its bid been timely received. Plaintiff received a jury verdict in the district court, but the district judge granted defendant's motion for judgment *n.o.v.* On appeal to the Third Circuit Court of Appeals, the jury's verdict was reinstated and judgment for plaintiff upheld, on a promissory estoppel basis.

Serious questions of authority and causation existed in *Universal Computer*. The defendant argued that it could not legally have made the promise plaintiff asserted, and that its agent had no authority to do so. The district court judge accepted this defense. Defendant also disputed the value of plaintiff's lost expectation. But the appellate court held that Gebert had apparent authority to make that promise and that the probability of plaintiff as low bidder receiving the contract was sufficiently established to allow the jury to find for plaintiff on the damage issue.

As decided, Universal Computer's case for liability rested on its reliance on Gebert's promise (for which Blue Shield was held responsible), and the cost of that reliance—its loss of a profit which would have been earned had its bid been received and considered as promised. This was not a promise for which defendant exacted any exchange, and thus it would not have been deemed supported by consideration under the currently accepted definition of that term. But it was clearly a promise made in furtherance of economic activity, and under the F & M approach would have been enforceable without regard to reliance. Whether Gebert made his promise intending to be legally bound seems highly unlikely. Presumably he was just accommodating a bidder in the hope of maximizing the number of eligible bids from which the defendant could select.

Despite the potential applicability to this case of the F & M "economic activity" rule, which would have made Gebert's promise immediately enforceable upon its making,³⁷⁴ it appears that an immediate or prompt retraction by Gebert—later on Friday afternoon, say—would have entirely avoided any liability on the defendant's part. Initially, the promise was one which the plaintiff could reasonably expect to be performed, since performance would have been in the defendant's economic interest as well as the plaintiff's. However, as soon as it was clear to plaintiff that performance of that promise

374. In setting forth their proposed rule of liability, F & M are of course careful to point out that there may be agency problems, see Farber & Matheson, *supra* note 61, at 934, but the appellate court in *Universal Computers* resolved that issue against the defendant. See *id.* at 932-33. They also note that a definite commitment is required, but again the court's decision seems to have resolved that issue in the plaintiff's favor.

would not be forthcoming, plaintiff could no longer reasonably rely on that promise, and at that point would have been required to mitigate its damage. If any means remained available for getting the plaintiff's bid to Harrisburg by noon on Monday, defendant would not have been liable for withdrawing its promise.³⁷⁵ Even though the plaintiff psychologically began to "rely" on the promise as soon as it was made, a non-mitigatable change of position by the plaintiff occurred only at the point when timely delivery of its bid was no longer possible. Under both the promissory estoppel approach and the F & M expanded definition of consideration, the promise could with impunity have been retracted until that time, because of the doctrine of "avoidable consequences"—the principle of mitigation of damages.

The foregoing illustrates that the principle of reliance has an impact much broader than just "promissory estoppel." Even if a promisee has received a promise that under existing doctrine is enforceable per se, the promisee may still lack any effective remedy for its breach because the promisee's position has not changed beyond her ability to mitigate any injury from that breach.³⁷⁶ It is not accurate to say that the rules governing remedies never compensate the non-relying promisee, but it is fair to say that the promisee whose position has not changed beyond the possibility of mitigation will often have little or no legal remedy for a breach.³⁷⁷

375. Since Harrisburg is only 220 miles from Westport, obviously plaintiff could have gotten its bid to the defendant by noon on Monday even if it did not learn of Gebert's retraction until late on Sunday.

376. See generally RESTATEMENT (SECOND) § 350; FARNSWORTH, CONTRACTS § 12.12; Charles L. Knapp, *Mitigation of Damages: The Doctrine of Avoidable Consequences*, in COMMERCIAL DAMAGES § 4.1 (1993).

377. Depending on the possibility of mitigation, there might perhaps be some difference between the reliance and expectation remedies in *Universal Computers*. If the defendant's promise had been repudiated even as late as Sunday afternoon, the plaintiff's bid could still have been timely delivered by Monday noon, but it might have been necessary for plaintiff either to arrange for someone else to pick up the bid at the airport and hand-carry it to defendant, or even to transport the bid to Harrisburg in some other way, by car perhaps. If the defendant's promise were regarded (*a la* F & M) as being binding as soon as it was made, then even a timely retraction would leave the defendant at least theoretically liable for the cost of transporting plaintiff's bid from the airport to the defendant's office. If the defendant's promise were enforceable only on a reliance basis, however, and for that reason a reliance-based recovery was deemed appropriate, that remedy would presumably be computed on the assumption that since plaintiff would have originally borne the cost of airport-to-office transportation, defendant should be liable only for the excess over that cost occasioned by plaintiff's reliance on its promise. The relative triviality of the difference between these hypothetical claims underscores the fact that in the real *Universal Computer* case, the battle was not over what we sometimes think of as the "ordinary" kind of reliance, out-of-pocket expenses, but rather over the loss of a profit opportunity occasioned by reliance on defendant's promise. Once the defendant's refusal to honor its promise had put that opportunity out of reach, both the "expectation" and the

Thus it appears that even under the F & M regime, the question of reliance would continue to be relevant in various ways. Let us turn our attention now to Barnett's "intention to be bound" approach. To illustrate the problems that could arise in that area, consider some well-known intra-family cases in which promissory estoppel was applied. In *Greiner v. Greiner*,³⁷⁸ the Kansas Supreme Court affirmed judgment for Frank Greiner, who defended a forcible detention action brought by his mother. Frank answered his mother's complaint, saying she had promised to convey to him a plot of land, if he should abandon his landholding in another county and come to live near her. On facts strongly reminiscent of the early *Kirksey v. Kirksey*³⁷⁹ (the classic "Sister Antillico" case), the court in *Greiner* invoked Restatement section 90 in holding for the defendant on the basis of his actions in reliance. Judgment for defendant Frank Greiner could conceivably have been based on a somewhat strained application of the consideration doctrine,³⁸⁰ but the availability of promissory estoppel made that unnecessary. *Greiner* is thus an excellent example of a decision that could probably have been reached without promissory estoppel, but is more easily reached and better justified by that doctrine. *Greiner* also represents a class of cases which would probably be unaffected by the doctrinal reforms suggested by F & M. Not having been made in the furtherance of economic activity, Mrs. Greiner's promise to her son Frank would not come within the F & M expanded view of consideration-supported commitments.

As to the effect on *Greiner* of Barnett's suggested doctrinal innovations, however, the outcome is less clear. Did Mrs. Greiner appear to intend to be legally bound by her promise? This may have been unclear at the outset, although as time went on she seems to have contemplated and discussed a variety of actions that clearly *would* have had legal effect, such as making a will in Frank's favor or conveying a deed to him.³⁸¹ That factor could cut both ways. On the one hand, by expressing her intention of benefiting Frank through one means or another, Mrs. Greiner manifested the seriousness of her intent to carry out her purpose, thereby strengthening the reasonable-

"reliance" recovery should encompass compensation for its loss. See generally Knapp, *supra* note 376, at § 2-1.

378. 293 P. 759 (Kan. 1930).

379. 8 Ala. 131 (1845).

380. Although facts are lacking, the same is probably even more true of the *Kirksey* case.

381. Of course, making a will in Frank's favor probably would not have had any legal effect in the actual case, since Mrs. Greiner—apparently at the urging of another of her children—repudiated her promise to Frank during her lifetime. She would presumably have revoked such a will, if made.

ness of Frank's reliance thereon. On the other hand, her discussion of those various legal actions—which she never did carry out—could be seen as undercutting any intention on her part to be *legally bound by her promise alone*. The point is debatable, and the answer is not obvious, but under Barnett's scheme it becomes crucial. By insisting on the element of intent-to-be-legally-bound, Barnett's suggested reformulation of promissory estoppel would work a substantial narrowing of the present section 90.³⁸² By increasing the plaintiff's burden in such cases, it would risk the denial of recovery to future Frank Greiners. As argued above,³⁸³ this narrowing of promissory estoppel seems unwarranted and unwise. Whether Frank Greiner believed that his mother intended her promise to be legally enforceable should not be controlling. Far more important is the fact that when he took action in reliance on her promises to him, he trusted her (as his mother, clearly concerned about his welfare) to perform what she had promised—making any thought of legal enforcement on his part unnecessary and unlikely.

In contrast to *Greiner v. Greiner*, consider the classic early case of *Ricketts v. Scothorn*.³⁸⁴ In *Ricketts*, a grandfather's promissory note made payable to his granddaughter Katie was enforced against his estate on the basis of an "equitable estoppel" (generally now regarded as an early version of "promissory estoppel"), because the promisor had apparently wished by his promise to present his granddaughter with at least the option of quitting her job, and she had indeed done so. Like the mother's promise in *Greiner*, the grandfather's note in *Ricketts* was not within the area defined by F & M; although his promise had an effect on his granddaughter's employment decision, it was not made in furtherance of any economic activity of the grandfather. Their proposed expansion of consideration would thus have no effect on a case with facts like those in *Ricketts*.

As with *Greiner*, however, the adoption of Barnett's "intent-to-be-bound" liability rule³⁸⁵ could have had an effect on *Ricketts*, although this time it might cut the other way. Unlike the mother's oral promises in *Greiner*, the promissory note in *Ricketts* was in legal form, and should easily pass Barnett's apparent-intent-to-be-bound test. Under that rule, the note would presumably have been fully enforceable as soon as delivered (and immediately *payable*, too, being a demand note), without regard to any reliance. Would Barnett's rule improve the court's ability to deal with a case like *Ricketts*?

382. RESTATEMENT (SECOND) § 90.

383. See *supra* text accompanying notes 223-33.

384. 77 N.W. 365 (Neb. 1898).

385. See *supra* text accompanying notes 216-22.

Since the economic loss to the plaintiff in that case appears to have been less than the amount of her grandfather's note (her quitting work was only temporary), the facts in *Ricketts* can be used to support the argument that damages in promissory estoppel cases could be limited to reliance damages. On the other hand, full protection of the reliance interest in *Ricketts* might justify full enforcement of the promise since Katie's quitting her job even for a period could have entailed real but unproveable other loss.³⁸⁶ But that argument rests on the assumption of at least *some* reliance injury to the plaintiff—substantial, if perhaps unquantifiable. Should the grandfather's promissory note have been enforceable immediately and in the full amount, in the complete absence of any reliance at all? Barnett, along with Y & T, would apparently answer yes.³⁸⁷ But just as the presence of reliance made *Ricketts* a stronger case, its absence would make it a substantially weaker one. If instead of dying with his promise unrevoked, the grandfather had survived to retract that promise before his granddaughter took any action at all in reliance on it, one might well conclude that on those facts no injustice would flow from withholding enforcement. This would be particularly true if the

386. Cf. Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 28-29 (1979) (discussing the *Kirksey* case).

387. Barnett on the basis of apparent intent to be legally bound; Y & T on the basis of the clear foreseeability of definite and substantial reliance (whether or not such reliance actually takes place). It should be noted, incidentally, that one virtue that might be claimed for Barnett's approach is the fact that some third party might pay to acquire the grandfather's promissory note, ignorant of whether it had been relied on or not. But of course the principle of negotiability—now as in the day of *Ricketts*—protects any third party taker of a negotiable instrument who qualifies for holder in due course protection against the assertion of, inter alia, a lack of consideration defense by the maker. See U.C.C. §§ 3-302 (1995) (defining holder in due course), 3-303(b) (stating that drawer or maker of instrument has defense if instrument issued without consideration), 3-305(a) (stating that right of holder in due course subject to "real" defenses—fraud, incapacity, etc.—but not to defense of lack of consideration). The Barnett approach would go beyond that well-established principle, in effect turning every promissory note, consideration or not, into a quasi-negotiable one. Whether that is intended is not clear; whether it is desirable is debatable. Of course, Restatement (Second) section 90 now protects third-party reliance as well. Could that provision be read also to protect the transferee of a *non-negotiable* promissory note who relies on the promise by paying for the note? In view of the ready availability of the negotiability device for just this situation, and the need for foreseeability here as elsewhere under section 90, it may be that special circumstances would be needed to turn that action into foreseeable and reasonable reliance. It does not appear, incidentally, that the promissory note in *Ricketts* was indeed in negotiable form. Compare *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898) with *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919) (a well-known case in which an intra-family promissory note was not enforced for lack of consideration, despite the fact that it apparently was in negotiable form: as payee on the note, the plaintiff presumably would not have qualified for holder in due course status).

granddaughter had not only continued to work, but also had stopped going to the church her family had traditionally attended, had publicly snubbed her grandfather's new wife, and was dating boys her grandfather (for not inappropriate reasons) strongly disapproved of.³⁸⁸

Similar questions can be raised about the enforcement of promises made to charities. Over the years, courts have generally attempted on one ground or another to uphold promises made to charities. A famous example is the *Allegheny College* case,³⁸⁹ in which Judge Cardozo mustered a majority of the New York Court of Appeals behind the proposition that the deceased promisor's subscription could be enforced against her estate on the basis of an implicit promise by the college to memorialize her name, while at the same time in his opinion for the court flirting with the notion that promissory estoppel would also have justified enforcement.³⁹⁰ Building on this history of judicial sympathy, the Restatement (Second) proposed in its version of section 90 a rule permitting recovery on promises to charities without requiring proof of reliance. Despite the public policy arguments in favor of such a rule, some courts have disagreed. In *Maryland National Bank v. United Jewish Appeal Federation*,³⁹¹ for instance, the Maryland Court of Appeals declined to adopt the Restatement (Second) approach, insisting on either a demonstration of consideration or a showing of definite and substantial reliance on the particular promise sought to be enforced.

In this area, the doctrinal innovations suggested by the commentators seem potentially important and useful. As we have seen, the F & M "economic activity" rule can easily be stretched to accommodate any donative promise made to a charity by a business enterprise.³⁹² And the Barnett "intent to be bound" rule could make formal promises to charities enforceable per se. Thus, both approaches could in different ways advance the policy goal of the Restatement (Second's) proposed approach to charitable giving.

As in the *Greiner* case, the sticking point comes in the situation where an informal promise is made, apparently with the serious intent to perform, and the promisee, in reliance on that promise, proceeds to rely in substantial ways. Should the charity in that event also have to

388. Professor Eisenberg has suggested that if intra-family donative promises were to be freely enforceable without regard to reliance, they should probably be subject to defenses of improvidence and ingratitude, as they are in civil law countries. See Eisenberg, *supra* note 386, at 13-18.

389. *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (1927).

390. See generally Alfred S. Konefsky, *How to Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645 (1987).

391. 407 A.2d 1130 (Md. 1979).

392. See *supra* note 77 and accompanying text.

meet Barnett's requirement that the promisor have intended apparently to be legally bound by her promise? Again, this seems questionable. Even if not formally expressed, a charitable promise that is nevertheless really made and substantially and reasonably relied on, should at least be enforceable under the general promissory estoppel rule of section 90, without insisting on a further requirement of intent to be bound.³⁹³ Even the Maryland court which rejected the Restatement (Second's) suggested special rule for charities would have enforced on the basis of the general section 90 rule, had sufficient reliance on the particular promise been shown.³⁹⁴ But worries about insufficiently deliberate or unduly influenced promises might also affect one's willingness to enforce an informal promise in the charitable area, even if the promise had been demonstrably relied on.³⁹⁵

393. How Barnett himself would view the *Allegheny College* case today is far from clear. In his *Death of Reliance* exposition of an intention-to-be-legally-bound rule of liability (his suggested Restatement section 71B, see *supra* text accompanying note 216), Barnett includes an illustration seemingly inspired by *Allegheny College*:

6. A promises to donate \$5,000 to B, a religious college, in a signed writing that includes the statement that, "I hereby intend to be bound." A's promise is enforceable regardless of whether B relies on it.

Barnett, *supra* note 204, at 533. But this illustration goes beyond the facts of the real *Allegheny College* case by including an express statement of intention to be bound; here, Barnett has simply shot a fish in his own doctrinal barrel, so to speak. In the real *Allegheny College* case, the promisor's pledge (which seems to have been a preprinted form) did not have such a statement, but it included the language "in consideration of my interest in Christian education and in consideration of others subscribing, I hereby subscribe . . ." *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173, 174 (1927). Barnett's section 71B includes the possibility of a recital of "nominal consideration" to make the promise binding, but his only illustration of this point is the phrase "in return for valuable consideration of \$1.00." Barnett, *supra* note 204, at 533 (Illustration 3). Barnett's suggested new rule shares with existing Restatement (Second) section 87(1)(a) (discussing recital of "purported consideration;" see comment b discussing "nominal consideration") ambiguity as to whether the recited "consideration" must be something that could satisfy the traditional consideration requirement, if actually present in the transaction. Presumably "my interest in Christian education," even though quite probably present in *Allegheny College*, would *not* serve legally as consideration, but "others subscribing" could. In his reliance-recovery section, section 71C, Barnett fails to give any express indication whether in his scheme an *Allegheny*-type promise could be enforceable solely on the basis of reliance (although his discussion in comment c seems to imply that it might).

394. See *Maryland Nat'l Bank*, 407 A.2d at 1138.

395. In suggesting near-automatic liability for charitable-subscription promises, the Restatement (Second) follows up its seemingly strong statement of the rule in section 90(2) ("binding . . . without proof that the promise induced action or forbearance") with the following illustration:

17. A orally promises to pay B, a university, \$100,000 in five annual installments for the purposes of its fund-raising campaign then in progress. The promise is confirmed in writing by A's agent, and two annual installments are paid before A dies. The continuance of the fund-raising campaign by B is sufficient reliance

The preceding discussion has addressed the role of promissory estoppel as a reason for enforcement, distinct from consideration or formal devices like the seal.³⁹⁶ But that doctrine also plays a role in overcoming formal rules, such as the requirement of definiteness³⁹⁷ or the statute of frauds.³⁹⁸ Here again, a change in the law—in this area, abandonment of the formal rule—could obviate the necessity of invoking reliance as a means of overcoming such a requirement.³⁹⁹ Until that happens, estoppel should continue to be available and effective in cases where the promisee's reliance both corroborates the making of the promise and makes enforcement appropriate despite the non-satisfaction of the formal requirement.⁴⁰⁰

The foregoing is hardly an exhaustive treatment of the role of reliance in contract law, either now or in the future. I have merely attempted to suggest a variety of ways in which the presence or absence of reliance could be important in deciding whether promises should be enforced, even under the liberalized approaches to liability advocated by the various commentators whose work we have discussed. It

to make the promise binding on A and his estate.

RESTATEMENT (SECOND) § 90(2) cmt. f, illus. 17 (1981). As an illustration of a bare-bones automatic enforcement rule, this is somewhat short of compelling; given the written confirmation and partial performance during the promisor's lifetime, there seems little other than a Ouija-board message from the departed himself that could have been loaded on to make enforcement look appropriate. (Similar facts were not enough, however, in *Maryland National Bank v. United Jewish Appeal*, discussed *supra* text accompanying note 391; conversely, in *Allegheny College*, the promisor had recanted before her death, but to no avail.) The Reporter's Note to Restatement (Second) section 90 indicates that illustration 17 quoted above was based on *In re Field's Estate*, 172 N.Y.S.2d 740 (Surr. Ct. 1958), a case in which one assumes, reading between the lines, that everybody involved (including the heirs) wanted the promised gift upheld, perhaps for tax reasons. A more convincingly adversarial illustration for section 90(2) would have been *Woodmere Academy v. Steinberg*, 363 N.E.2d 1169 (N.Y. 1977) (also, like *Allegheny College* and *Field's Estate*, from New York), in which the promisor, still very much alive and strenuously resisting enforcement, was held to his promise to donate \$200,000 to plaintiff prep school; of course, plaintiff school *had* named its library for Mrs. Steinberg.

396. A modern example would be the "firm" offer in U.C.C. section 2-205, irrevocable if in writing and signed. See U.C.C. § 2-205 (1995).

397. RESTATEMENT (SECOND) § 34(3) cmt. d (stating that reliance may make remedy appropriate despite uncertainty). See, e.g., *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965).

398. RESTATEMENT (SECOND) §§ 139, 150.

399. At one point in the evolution of the revised Article 2 of the U.C.C., it appeared that the Code's statute of frauds for the sale of goods, section 2-201, would simply be omitted from the revised Sales Article. As of this writing, it appears that some version of the writing requirement will survive, probably with some indication either in the section or its comments that reliance may trump the writing requirement. See *infra* note 148.

400. One proposed version of the new U.C.C. statute of frauds in Article 2 would have explicitly incorporated a reliance-based exception to that statutory formality. See the discussion of July, 1997, draft of § 2-201(c)(3), *infra* note 148, at 21.

does not appear to me that reliance would necessarily become irrelevant in that world. Indeed, if the combined Farber-Matheson-Barnett-Yorio-Thel approaches should completely prevail, we might well feel the need of an additional equitable principle to temper their sweeping effect, a sort of promissory-estoppel-in-reverse:

If the maker of a potentially enforceable promise can carry the burden of showing that *no* reliance had occurred when that promise was revoked, enforcement may be *denied if no injustice will result therefrom*.

The further exploration of this suggested application of the reliance principle can well be left to more elaborate discussions of the pros and cons of expanding our notion of consideration. For our purposes here, it may be enough to suggest that while promissory estoppel is presently employed to rationalize some of the results that the promise theorists applaud, continued attention to the reliance factor will be appropriate even after a sweeping, promise-theory-based relaxation of the consideration requirement has taken place. If, as F & M have reported, reliance-based promissory estoppel is in the process of persuading the consideration doctrine to let its hair down and relax, that's probably a happy development. But it looks like the reliance principle should hang around the party for a while anyway, to serve as the designated driver if needed.

B. Understanding Cases: Reliance v. Reliance

In the introduction to this Part IV, I suggested with perhaps seeming redundancy that focusing on the principle of reliance protection not only helps us decide cases better, it can help us understand them better. In the preceding section, I suggested that reliance analysis might continue to be useful in contract decision-making even if the doctrinal reforms recommended by recent commentators were generally accepted. In this section, I will attempt to demonstrate how attention to the reliance factor can help us better understand other, more complex cases.

Most of the examples discussed in the previous section were prototypical promissory estoppel cases—cases in which the defendant appears to have made a promise on which the plaintiff relied, justifying enforcement despite some doctrinal impediment. In such cases, the role played by reliance seems simple and obvious, and the only question is whether the relied-on promise should be enforced despite the doctrinal obstacle. One party is (or appears to be) the “relying” party, while the other party is the one whose commitment may be deemed enforceable by virtue of the first party’s reliance. There are many cases, however, in which *both* parties are relying, each in its

own way, on *something*. Both forms of reliance may appear reasonable, and both may seem worthy of protection. How might such a state of affairs come to pass? And when it does, how are we to prioritize—to decide whose reliance is *more* worthy of legal protection?

Consider the following sampling of some of the situations in which promissory estoppel is commonly thought to have potential application: (1) Gratuitous promises, not otherwise supported by consideration—intrafamily gifts, non-exchange business promises, charitable subscriptions; (2) Unwritten agreements within the statute of frauds—sale of land, sale of goods, a promise to answer for another's debt, an agreement not to be performed within a year; (3) Revoked offers; and (4) Modification agreements. In all these situations, one party—for the purposes of this discussion, call her the promisee—may claim to have relied on the other party's promise of performance. But the other party, the promisor, may assert that he relied as well—that he relied *on a rule of law that would protect him from liability on his promise*.⁴⁰¹ Is this a credible assertion? And if it is, is this type of reliance deserving of legal protection—protection which in this situation would consist of a denial of the promisee's claim?

It should be noted that many of these non-liability rules are far from absolute; the armor they provide against liability has many a gap. Intra-family promises can sometimes fit into the bargain mold, as can some ostensibly gratuitous business promises; the same is true of charitable donations, and even in the complete absence of consideration charitable promises are sometimes enforced. Some mixed goods/services agreements will fall within the more liberal statute of frauds in U.C.C. section 2-201, and be enforceable. Many contracts are taken outside the one-year statute of frauds by remote contingencies of termination. An oral promise to answer for the debt of another may be deemed enforceable under the "main purpose" rule.⁴⁰² An offer may appear to be "firm," and for that reason be irrevocable under either U.C.C. section 2-205 or Restatement (Second) section 87(1)(a). An agreement modifying an existing contract may fall under Article 2, and thus require no consideration under the rule of U.C.C. section 2-209(1); if not, the "unanticipated difficulties" rule of Restatement (Second) section 89(a) may yet apply. So, in many cases, a legally-knowledgeable promisor could not rely with complete assurance on the protection of a conventional non-liability rule. He

401. Here, as generally throughout this article, assigning genders to the parties is intended only as a convenience, to assist me (and you) in differentiating between them in the various hypothetical cases set for discussion.

402. RESTATEMENT (SECOND) § 116.

would be aware of the possibility that the promisee could successfully invoke one of the exceptions or limitations on the rule in question.

On the other hand, there are surely many cases where the promise in question could clearly fall within a general rule of non-liability. Examples could include the promise of a gift from one family member to another; an oral agreement to sell land; withdrawal of an unaccepted non-goods offer, even if purportedly "firm"; the completely "one-sided" modification of a service agreement, not generated by any surprising difficulty of performance. In these situations, a legally-knowledgeable promisor might with confidence assume that some legal rule protected him against liability on his promise.

So, in many cases, it appears that a promisor seeking to avoid liability for nonperformance of his promise could credibly declare: "I never would have made that promise if I hadn't honestly and reasonably believed that it was *not* legally enforceable." He might willingly so testify under oath, and we might well believe him. "And therefore," his argument would continue, "you shouldn't hold me to it." Perhaps that argument should not enable the promisor to stave off liability if the rule he relied on did not in fact provide the protection he expected it would. (Maybe consideration for his promise was not required, or could be found in some element of the transaction; maybe the statute of frauds did not apply to his promise after all; maybe his offer was "firm," and fell under Article 2.) But suppose the promisor is right about the non-liability rule: It does apply to the facts of his case, and—except for the possible effect of the promisee's reliance—the promisor would indeed have no legal obligation by reason of his nonperformance. When, if ever, should the *promisor's* reliance *on a rule of law* trump the promisee's reliance on the expectation of his performance?

Despite contract law's professed allegiance to the "objective theory" of contract formation and enforcement,⁴⁰³ it is clear that in many cases contract law does care about the actual state of mind of one or both of the actors in a contractual dispute.⁴⁰⁴ And in order to reach

403. See RESTATEMENT (FIRST) § 230 (stating that standard of interpretation where there is integration is that of a "reasonably intelligent person"); RESTATEMENT (SECOND) § 200 cmt. b ("[T]he intention of a party that is relevant to formation of a contract is the intention manifested by him rather than any different undisclosed intention.").

404. Despite continued reference to the issue of whether one party has "reason to know" of the other's meaning or intention, the Restatement (Second) rules regarding contract formation and interpretation depend not only upon the appearance of intention but on the fact of intention as well. See, e.g., RESTATEMENT (SECOND) §§ 19, 20, 21, 26, 27, 201. Perhaps because it owes fealty to Karl Llewellyn rather than to Samuel Williston or Oliver Holmes, the U.C.C. in Article 2 is able to be a little more forthright on the issue of intent. See, e.g., U.C.C. §§ 2-204(3) (1995) (stating that a contract with open terms may be

this point in our analysis, we have necessarily accepted the possibility that the promisor will make a claim about his state of mind at the time the promise was made, a claim which we are willing to accept both as true and also as potentially significant. So it should be no great stretch to posit that in order to assess the relative strength of the parties' positions, we must also consider the state of mind of the promisee. What did she know about the rule of law by which the promisor claims to be excused, and about the promisor's reliance on it when he made his promise to her? A variety of cases may be imagined.

Case 1. At the time the promise was made and relied on by the promisee, she was unaware of the non-liability rule. This is clearly the easiest case. Assuming the promisee really didn't know of the rule, but the promisor *did*, then the promisor may have been aware of the promisee's ignorance.⁴⁰⁵ Even if he was not, he apparently did nothing to bring home to her the existence of a rule he might later invoke to avoid liability for nonperformance. Until the promisee has changed her position in reliance on the promise, the promisor may invoke that rule to explain and justify his nonperformance.⁴⁰⁶ Once the promisee has relied, however, it should be too late for that. By first making and then breaking an apparently genuine commitment to the promisee, the promisor has induced her to rely to her detriment on the prospect of his performance. Being unaware of the non-liability rule, the promisee could not anticipate the promisor's later invocation of that rule to escape liability for his nonperformance. Her claim for relief is based on actual injury, which he caused and could have avoided.⁴⁰⁷ If the promisor is left worse off by enforcement of his

binding if parties have intended to make a contract), 2-305(1) and (4) (stating that parties if they so intend can conclude contract with open price term; when parties intend not to be bound unless price is fixed or agreed they are not bound unless it is so fixed or agreed).

405. This suggests the possibility that the promisor's non-disclosure could be wrongful, in legal effect an assertion that no such rule of law existed. Cf. RESTATEMENT (SECOND) §§ 161 (defining when nondisclosure is equivalent to an assertion), 170 (explaining reliance on assertions as to matters of law).

406. Even if the promisor's action in making a promise he did not intend to keep could be treated as fraudulent, if the promise is repudiated before the promisee has relied on it, the promisor would presumably have incurred no liability. In order for fraud or misrepresentation to have legal effect, it must be relied on by the other party. See RESTATEMENT (SECOND) §§ 163, 164 (stating that to prevent formation of contract or make contract voidable, fraudulent or material misrepresentation must induce manifestation of assent by the other party), 167 (stating that to be "inducing cause", it must be at least a substantial factor influencing decision). Of course, in the context of our discussion, the party affected by fraud or misrepresentation of intent (our "promisee") does not want to avoid a contract so induced, she wants to prevent the other party from escaping liability on his promise by invoking a rule of law, the existence of which was withheld from her.

407. Yes, there is at this point an issue of whether relief for the promisee requires pro-

promise, this is not the fault of the promisee; it is rather the result of the promisor's own breach of trust. On the other hand, to withhold a remedy from the promisee would leave *her* worse off by virtue of her reliance, even though she has not acted unreasonably. The moral force of protecting trust reasonably reposed, combined with the social utility of compensating harm induced by breach of trust, surely exceed in this case whatever utility might come from adherence to a general principle leaving promisors free to make and then break promises with impunity.

Suppose, however, that the promisee is aware of the non-liability rule that might protect the promisor, but relies on his promise anyway. Here things get more complicated. Professor Barnett and others have questioned whether a promisee can ever reasonably rely on a promise which she knows to be unenforceable under some rule of law.⁴⁰⁸ The answer seems to depend on more factors than just the promisee's knowledge, however. Consider some of the possible variations:

Case 2. Although the promisee knows of the non-liability rule, she is assured by the promisor that he will provide her with a writing, ensuring legal enforceability. (This case of course assumes that the non-liability rule is a "statute of frauds," some rule that requires a writing for enforcement.) Even the Restatement (First) was willing to accept this ancillary promise as a sufficient predicate for protection of the promisee's reliance, placing this situation alongside the case where a promisor falsely (and probably fraudulently) represents that a writing does in fact exist.⁴⁰⁹ The promise to create a writing could also be fraudulent, if made with no intention of performance, but it need not be; it may have been sincere when made, and still give rise to a "promissory estoppel" on the promisee's behalf.⁴¹⁰ If the promi-

tection of her expectation interest, or merely compensation for her reliance injury. I am not addressing that question in this discussion.

408. See Barnett & Becker, *supra* note 104, at 452. See also Goldstick v. ICM Realty, 788 F.2d 456, 465 (7th Cir. 1986) (Posner, J. discussing the erosion of the statute of frauds by promissory estoppel).

409. Restatement (First) section 178, comment f, asserts that an "estoppel" may preclude use of the statute of frauds defense where substantial action has been taken in reliance on either a representation that the statute has been satisfied (*i.e.*, that a sufficient memorandum has been created) or a promise to create such a memorandum. The comment refers to the latter possibility as "an effective promissory estoppel," the only use of that terminology in the Restatement (First).

410. Even courts not generally hospitable to promissory estoppel as a counter to the statute of frauds defense may accept the notion that an express promise to provide a writing can effectively overcome the statute if relied on. See, *e.g.*, Klink v. Famous Recipe Fried Chicken, Inc., 616 P.2d 644, 647 (Wash. 1980) (*en banc*). Although Restatement (First) section 178 comment f does say that the promissory estoppel may operate "if the

sor does not perform as promised, he is guilty of a double breach of trust, having broken not one promise but two; for her part, the promisee by perhaps soliciting the promise of a writing may have taken at least some precaution against the operation of the non-liability rule. These factors taken together make the case for the promisee still an appealing one, despite perhaps a greater awareness on her part of the riskiness of reliance.

Case 3. The promisee is aware of the rule of non-liability, but the promisor assures the promisee that he can be counted on to perform despite the legal barrier to enforceability. In this case, that barrier might be lack of compliance with a formality (as in Case 2), or it might be lack of consideration.⁴¹¹ Here again, if the promisor reneges he is guilty of a double breach of trust. The Restatement (Second) section 139 goes beyond the earlier rule, providing that a promissory estoppel to override the statute of frauds may arise on the basis of reasonable and foreseeable reliance, not necessarily dependent on an express promise to create a writing.⁴¹² But that does not answer our question as to the effect of the plaintiff's awareness of the non-liability rule.⁴¹³ Should that factor tip the balance away from the promisee?

In our earlier discussion of *Greiner v. Greiner*,⁴¹⁴ I asserted that

Statute [of Frauds] would otherwise operate to defraud," cases like *Klinke* do not appear to insist that the promise have been technically fraudulent to trigger the estoppel.

411. If the barrier to enforcement is the statute of frauds, Case 2 and Case 3 may well occur in combination: The maker of an oral promise who commits himself to create a writing formally memorializing that promise may also give assurances that in the meantime (pending the creation of the writing) he can be trusted to render the promised performance.

412. Restatement (Second) section 139 has only two illustrations in which liability is imposed despite the statutory bar. (One is based on *Vogel v. Shaw*, 294 P. 687 (Wyo. 1930), the other on *Alaska Airlines, Inc. v. Stephenson*, 217 F.2d 295 (9th Cir. 1954).) The facts of each include a promise by the defendant to provide a written contract. Neither the text of section 139 or its comments indicate that this factor is a requirement for its operation, however, and cases have applied the rule of section 139 where no such promise was shown. See, e.g., *McIntosh v. Murphy*, 469 P.2d 177, 181-82 (Haw. 1970) (holding that an oral one year employment contract was enforceable based on promisee's reliance despite apparent violation of the statute of frauds).

413. Restatement (Second) section 139(2) lists a number of factors the courts should consider in deciding whether an estoppel sufficient to overcome the statute arises from the plaintiff's reliance. In addition to the definite and substantial character of that reliance, and the availability of other remedies, the section stresses the possibility that the reliance may itself help to corroborate the plaintiff's claim, thus furthering the statute's goal. Section 139(2)(d) also directs the court to consider the reasonableness of the reliance, but nothing in the text, comments or illustrations of section 139 speaks to the question whether the promisee must have been ignorant of the statute in order to assert that her reliance was reasonable.

414. See *supra* text accompanying notes 378-383.

promisee Frank Greiner in relying on his mother's promises to convey land to him may well have been simply oblivious to the question whether her promises were legally enforceable. When you confidently expect a promise to be performed, there may be little occasion to consider what you will do if it is not. This is the proposition which, if accepted, can provide a solution to Case 3. Where the promisee trusts the promisor to do what he promised, her knowledge of a non-liability rule does not make her reliance per se unreasonable, because it is not the rule of law she is relying on—it is her trust in the sincerity and commitment of the promisor. In *Greiner*, promisee Frank may have trusted his mother simply because she *was* his mother. In non-family cases, trust may not be so easily reposed. But if the promisor actively encourages the promisee to expect him to perform despite the acknowledged existence of a rule of law that would protect him from liability, and she acts in substantial and foreseeable reliance on that assurance, this seems to me a valid basis for an estoppel.

The promisee's knowledge of the non-liability rule may be more problematic, however, in cases where the promisor's conduct is more equivocal.

Case 4. Both the promisor and the promisee are aware of the non-liability rule, and although the promisor assures the promisee he can be counted on to perform, he staves off requests to put his promise in a legally enforceable form. (This might be compounded by the promisor's delay in commencing performance itself, when the time for performance has seemingly arrived.) Here the promisee is on shakier ground. If the relationship between them or other circumstances are such as to induce trust on her part, her initial reliance may still be regarded as justifiable. At some point, however, the promisor's inactions may speak louder than his words, and further reliance by the promisee may appear unreasonable in light of the promisor's persistent refusal to commit himself formally.⁴¹⁵ If the remedy for the promisee's reliance is to be computed in terms of her reliance, this shift may be significant as regards later actions on her part. However, substantial reliance already incurred might form a sufficient basis for her protection.⁴¹⁶

415. At this point I'm irresistibly reminded of the Fred Astaire/Jane Powell number in *ROYAL WEDDING: How Could You Believe Me When I Said I Love You When You Know I've Been a Liar All My Life?* See *ROYAL WEDDING* (Metro-Goldwyn-Mayer 1951).

416. The facts as stated actually raise two different but related issues: 1) If promissory estoppel is the only basis on which liability can be imposed, has enough reasonable reliance occurred to give rise to the estoppel, even if the later reliance might not be viewed as reasonable? 2) Particularly if the remedy for recovery under a promissory estoppel theory is viewed as necessarily reliance-based, there may be a question whether some of the

Case 5. The promisee knows of the non-liability rule (as does the promisor),⁴¹⁷ but her decision to rely is made with little or no conscious attention to that rule because she reasonably believes the promisor's commitment to performance is genuine and will be kept.⁴¹⁸ Additional facts could be useful. Did the promisor actively encourage her reliance? Did the promisor stand to gain anything from that reliance? Were there "barriers to bargaining" that could have impeded what otherwise might have been an insistence by the promisee that the promise be somehow put in an enforceable mode? Such elements could strengthen the promisee's case for enforcement. But suppose none appear. The two parties stand on a relatively equal footing; both know of a legal rule that could protect the promisor from liability; she trusts him to do what he promises; she changes her position in reliance on his promise; he claims later that he purposely made that promise in an *unenforceable* way, so as to avoid any legal obligation to perform his promise. Which claim is stronger?

At this point the battle lines are drawn, and one must choose sides. Allegiance here could depend on the strength of the policy reflected by the non-liability rule. If the policy concern is merely the absence of consideration, the choice may be easier. The consideration doctrine in its classical form is so widely regarded as irreparably incoherent and undependable⁴¹⁹ that it hardly can expect diehard sup-

plaintiff's reliance should be noncompensable, under the doctrine of avoidable consequences. The case exemplifies the dilemma of prospective nonperformance unaccompanied by an express repudiation: At what point is it no longer reasonable to throw good money after bad? On a purely rational basis, this may be a hard decision to make; it may be even harder to cut your losses when this requires an implicit admission of misplaced trust.

417. I am using "knows" here in the sense it is used in the U.C.C., actual knowledge. U.C.C. § 1-201(25) (1995). This is more than just "reason to know," but in the case stated could be less than "awareness."

418. Cases 2 through 5 discussed in the text above are obviously very similar, but hopefully not indistinguishable. In Case 2, the promisor promises that a writing will be created. In Case 3, he assures the promisee that he can be counted on to perform even if his promise is not legally enforceable for some reason. Case 4 is like Case 3, but the promisor resists requests that he provide a basis for legal enforcement, such as a writing. Cases 2 through 4 all assume some degree of attention by the promisee to the possibility that the promise will be legally unenforceable, at the point when she makes her decision to rely. In Case 5, however, the promisee is assumed to have knowledge of the non-liability rule, but not "awareness" of it; her decision to rely is not based on the assumed presence or absence of legal enforceability, but is based on other factors.

419. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 35, 38 (1981) (characterizing the doctrine of consideration as incoherent and internally inconsistent). Professor Farnsworth offers this less-than-ringing endorsement:

As a cornerstone for the law of contract, the doctrine of consideration has been widely criticized. It would be foolhardy to attempt to defend it by an exercise in logic, for it must be viewed in the light of its history and of the society that pro-

port here or anywhere else. Few will rush to the defense of international communism as the Berlin Wall is crumbling. Breach of a trust reasonably reposed should be regarded as worthy of protection, even if the relying party should have known, indeed *did* know, that the consideration requirement might prevent legal enforcement of the promise.⁴²⁰

But suppose the non-liability rule is one of form—one of the various statutes of frauds. Can the promisee's reliance be protected if she knew of *that* rule? One is tempted here to invoke again the Berlin Wall, but a better analogy might be NATO. True, the revisers of Article 2 have had difficulty deciding whether to retain the sale-of-goods statute of frauds in some form, but the other conventional statutes of frauds are generally still in place, and even occasionally get beefed up by legislatures sensing the danger of successful fraud in particular transactions.⁴²¹ Unlike the consideration doctrine, with its variety of counter-intuitive applications, the possibility that a legal rule may require a signed writing for enforceability of a promise is

duced it. Nevertheless, in view of the difficulty that other societies have had in developing a general basis for enforcing promises, it is perhaps less remarkable that the basis developed by the common law is logically flawed than that the common law succeeded in developing any basis at all.

FARNSWORTH, *CONTRACTS*, *supra* note 16, at § 1.6. At one point in *The Paper Chase*, Professor Kingsfield is said to have written an article entitled "The Blessings of Consideration." JOHN JAY OSBORN, JR., *THE PAPER CHASE* 80 (1973). We are left to guess whether the title was ironically intended.

420. This seems as good a place as any to point out that the promisee might also be relying on her knowledge of a rule of law, in this case the rule of promissory estoppel. This is a difficult factor to assess. On the one hand, section 90 has been around at least since 1932, *see* RESTATEMENT (FIRST) § 90, and its Restatement (Second) offspring since 1979. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). One might with justification take the position that reliance on these rules is no less reasonable or significant than reliance on the rules of *non*-liability, such as the consideration requirement or the rules of form. But there is a problem here, nonetheless. It is one thing to counsel a client, "If you can get the other party to sign a formal 'contract,' you will probably be protected." It is—at least it seems to me to be—a different thing to counsel the client, "You should go ahead and rely on the promise that was made to you, because then you will be protected." I have never advised a client in these circumstances, but given the risks involved, it has always seemed to me that I would counsel the promisee to change position *only if she would do so anyway*, because of her trust in the promisor—not just for the sake of binding someone to a promise that she fears may not be performed, and could not otherwise be enforced. I have refrained from putting forth the promisee's conscious reliance on section 90 (or some other similar rule) as an independent argument for enforcement in this discussion, because a main thrust of my argument is that individuals rely on promises not primarily (if at all) because of their expectations of legal enforceability, but because of their expectations of performance.

421. *See, e.g.*, N.Y. GEN. OBLIG. LAW. § 5-701(a)(10) (McKinney 1989) (revised in 1964 to exclude possibility of contractual or *quantum meruit* recovery on alleged oral agreement for "finder's fee").

well within a layperson's area of foreseeability, so for a promisee to have at least a hazy knowledge of the rule would be neither unusual nor implausible. And the policy of requiring a writing does have a potential utility in deterring fraudulent claims, and encouraging orderly memorialization of business transactions.

For many courts and commentators, the policy choice presented by the statute of frauds has appeared to be of truly Hobsonian proportions: Enforce the statute, and thereby risk undercompensating truly deserving plaintiffs for the sake of deterring undeserving ones; override the statute in order to compensate apparently deserving plaintiffs, and thereby risk encouraging possibly successful fraud. But the choice presented by the case we are discussing is not so agonizing as that. In the statute of frauds area, reliance-protection actually represents not Hobson's choice but an eminently reasonable compromise. To protect only relying parties is to preserve the statute of frauds, but only up to the place where innocent people start to get hurt. The unrelieved-on agreement can be repudiated by either party with impunity, thanks to the statute of frauds, even if the other party's expectation interest thereby suffers a grievous blow. But the repudiation of a reasonably, foreseeably, substantially relied-upon oral agreement will occasion more than a theoretical injury, and deserves a more than theoretical remedy.⁴²²

Of course an ironclad, across-the-board enforcement of the statute of frauds could be "efficient," in the sense of avoiding litigation, both by deterring the allegation of spurious agreements and by stimulating the written memorialization of genuine ones. But we have by now over three centuries of experience to suggest the visionary nature of that solution. Nor does the recognition by many courts of a reliance-based exception appear to have opened a floodgate of litigation. Here, as in many other areas, lowering the doctrinal barrier to a potentially successful cause of action may mean additional "transaction costs" (read, lawyers' fees), but ordinarily it will result in a settlement rather than a trial. And the promisor who repudiates promptly, before reliance can occur, should be able to avoid even that.

It thus appears that even in Case 5, a court can and ordinarily should favor the rule-knowing, position-changing promisee over the rule-invoking, promise-breaking promisor. Does this result give too little weight to the promisor's claim to be protected by the rule of law, disappointing a legitimate expectation of insulation from liability? If the promisor truly intends when making his promise to invoke at

422. I realize that even a loss of mere expectation is an "injury," but it seems to me not a "hurt" in the sense that a reliance-based change of position may be.

some point a rule of non-liability (or at least wants to reserve his unfettered ability to do so), he can avoid this problem by making that plain up front. The promisee's reliance then will involve a conscious degree of risk, and may appropriately go uncompensated when the promisor repudiates liability, as he warned her he might. If he is not willing to expressly assert his unwillingness to be bound in this fashion, the promisor is truly trying to have it both ways, and has forfeited his claim to the law's protection.

Let us pause momentarily to sum up. The above discussion has considered the possible opposition of two types of reliance. On the one hand, a promisee may rely on a promise of performance by making a prejudicial change of position; that reliance could consist of rendering some performance of her own in exchange, or taking some other action on the strength of the promisor's apparent commitment to perform. On the other hand, the maker of the promise may have been relying on a rule of law to protect him from liability on his promise. Such reliance could consist of making an ostensibly firm and trustworthy commitment where otherwise no commitment at all (or at most a highly qualified one) would have been made. As we have seen, where these two types of reliance collide, the promisee's reliance appears almost always to have the stronger claim to protection. Only where the promisor's intention to rely on the nonliability rule as a shield from obligation is so unmistakable as to undercut his apparent commitment to performance is the promisee's reliance claim likely to appear weaker by comparison.

The above conclusions can be extended to other situations as well. Take for example an agreement modifying an already existing contract. The classical pre-existing duty corollary to the consideration doctrine forbids enforcement of a "one-sided" modification of an existing agreement, where one party receives a benefit but gives nothing in return. This result is customarily justified as an attempt to protect the original bargain against a later attempt by one party to extort a better deal when circumstances are more favorable to her, circumstances which typically include the difficulty or impossibility of finding a timely replacement for the performance promised by the party threatening default. The consideration requirement has proved an unwieldy tool for this purpose, and over the years the common law has developed a number of exceptions designed to allow the court to enforce modifications which, although one-sided, do not appear to have been the product of such opportunistic behavior. The U.C.C. in Article 2 takes the opposite tack, in section 2-209(1) simply negating any requirement of additional consideration for a modification, while

at the same time subjecting modification agreements to the general good faith requirement that permeates the Code.⁴²³ Against that background, consider the following:

Case 6. Suppose an existing bilateral contract, only partly performed. One party proposes a modification agreement favorable to her—perhaps a price increase for the services she was to perform, perhaps an extension of the time by which her performance was to be due, perhaps a variation in the mode of performance that would permit her to perform in a easier or less expensive manner. (She is the party we have called “the promisee,” but may also in these examples be thought of as the “performing party.”) Despite the fact that the modification benefits only the party proposing it, the other party freely agrees. (Following our pattern established above, he is the “promisor,” as well as the “paying party.”) In effect, this modification agreement amounts to a gift to the promisee. Why would the promisor agree to it? A whole host of possible reasons present themselves. Perhaps the promisee for her part has earlier agreed to some similar modification that benefited *him*. Perhaps the promisor thinks he might at some future time want the promisee’s assent to some other agreement that would benefit him and not her. Perhaps he regards this modification as not substantially inimical to his interests. Perhaps for some other reason he thinks it generally advantageous for him to have the good will of the promisee. Maybe he’s just a nice guy.

But maybe he’s not. In manifesting his agreement to this modification, the promisor might have believed that the agreement would be legally unenforceable, and thus could be freely repudiated by him later, if he chose to do so. This apparent agreement would probably be followed by acts of reliance by the promisee, which would likely include her continued performance under the original contract as modified. If at some later point the promisor should indeed renege on his promise to render and receive performance as modified by that agreement, the stage would be set once again for a contest for primacy of protection between two types of reliance: Reliance by the promisee on the promisor’s apparent agreement to the modification; reliance by the promisor on the rule of non-liability.

On the facts of Case 6 as described above, the modification agreement was not the result of opportunistic coercion by the promisee. In these circumstances, the only rule protecting the promisor from obligation would be lack of consideration, and the situation is

423. Comment 2 to section 2-209 asserts that a modification must meet the good faith requirement generally applicable throughout the U.C.C., and gives some guidance toward its application. See U.C.C. § 2-209 cmt. 2 (1995).

very like Case 5, discussed above. The consideration barrier against one-sided modifications is a highly porous one, even more so than the underlying general requirement of consideration. If Article 2 of the U.C.C. applies, there is simply no requirement of consideration for a modification under section 2-209(1). Even under the common law, if a modification agreement is fair in the light of unanticipated difficulties of performance, it may be enforceable under the rule of Restatement (Second) section 89(a) without fresh consideration.⁴²⁴ So reliance on lack of consideration as a protection against liability could be reliance on a slender reed indeed. But in order to test the strength of the promisor's reliance on the protection of the rule in Case 6, we must assume that it would indeed protect him—that except for the possible counterweight of the promisee's reliance, the promisor would not be bound by his apparent assent to the modification agreement, and could freely repudiate it.⁴²⁵

At this point we must assess the form which the promisee's reliance has taken. Unlike the cases considered earlier, this situation does not present the promisee with a completely free choice, to rely or not to rely. The promisee is already bound by a contract to the promisor, which obligates her to perform in a certain way. Her continued performance as originally promised would not under established rules constitute consideration for a modification. Conceivably it might not be viewed as "detrimental" reliance, either. But since at this point we are assuming that the consideration requirement is the *only* legal rule that would protect the promisor from obligation on the modification agreement, we are necessarily assuming in this example that the promisee is acting in good faith throughout, and not exercising any duress against the promisor. Even if the modification agreement does not call for any change at all in her performance (if the only change was a higher price to be paid for her services, for instance), still her rendering of that performance will now be based on

424. See RESTATEMENT (SECOND) § 89(a) ("A promise modifying a duty under a contract not fully performed on either side is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.").

425. The assumptions here might appear inconsistent. On the one hand, the promisee is assumed to have acted in good faith, and not opportunistically to coerce a modification. On the other hand, the modification agreement is apparently assumed *not* to qualify for enforcement under the rule of Restatement (Second) section 89(a) as a modification which is "fair and equitable in view of circumstances not anticipated by the parties when the agreement was made." RESTATEMENT (SECOND) § 89(a). One can, however, imagine a case in which it becomes apparent as the parties proceed with performance of their original agreement that the promisee has simply made a bad deal, and both parties realize and acknowledge that fact. The ensuing modification agreement could then be "fair and equitable," and yet not literally be the result of any "circumstances not anticipated," other than regret.

an expectation that the promisor's performance will be modified as he agreed, and her behavior may be affected in various subtle and perhaps unproveable ways by that factor. Even if the modification agreement were not regarded as immediately binding when made, the case seems an excellent one for binding the promisor as soon as any appreciable amount of performance, preparation for performance or other change of position⁴²⁶ has taken place in reliance on the newly modified agreement.⁴²⁷

Case 7. Let us now assume the polar opposite case to Case 6. There are no circumstances justifying modification, and the proposed modification is definitely not "fair and equitable." Nevertheless, the performing party threatens to breach unless the price for her performance is increased, and no timely equivalent substitute for her performance can be procured (except, perhaps, at grossly exorbitant cost). If breach occurs, it will cause substantial injury to the paying party, much of which would go uncompensated even in a successful breach of contract suit because of difficulties of proof, the foreseeability requirement for consequential damages, the undercompensation of non-monetary harm, and the inability to recover attorneys' fees. While making plain his unhappiness at having been strong-armed in this fashion, the paying party agrees to the modification. Privately, however, he intends to renege on his promise once the danger of injurious breach is past. The promisee completes her performance, but the promisor only pays what was originally promised.

Here the equities are completely reversed, obviously. Can the promisor successfully maintain his position? Several legal rules appear potentially to protect him from enforcement of the modification: The consideration requirement (under common law contract principles); the requirement of good faith (under the U.C.C.);⁴²⁸ and the notion of duress as a defense to the existence of a contract.⁴²⁹ The re-

426. The promisee might, for instance, decide to decline a third party's offer of some other transaction that she could not otherwise have afforded to forgo. Or, she might feel able to invest more resources in this performance than she otherwise would have, and thereby render a better-than-minimal performance, even though not contractually required to do so.

427. There is of course a paradox here. Continued performance by the promisee as originally promised would not under conventional doctrine be consideration for the promisor's agreement to some increased obligation on his part. It might, however, be sufficient detrimental reliance on her part to make the modification binding on a reliance basis. See RESTATEMENT (SECOND) § 89(c) (stating that a modification of a contract not fully performed is "binding to the extent justice requires" based on a party's detrimental reliance). The point is discussed at greater length in *Proliferation*, *supra* note 3, at 74-76.

428. See U.C.C. § 1-203 (1995) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

429. See RESTATEMENT (SECOND) §§ 175 (explaining when duress by threat makes a

quirements of these doctrines may differ slightly, and the promisor might have an easier time showing one than another, but they all potentially protect him here, as he hoped and intended they would when he ostensibly agreed to the modification.

Will the promisee's reliance on the modification agreement be sufficient to overcome this panoply of defenses? On the facts as stated so far, probably not. The promisee may argue that she has trusted the promisor to do what he promised, and her trust has been violated. But the promisor can respond that not only was the promisee herself guilty of such a breach of trust, but that hers came first, and was not—unlike the promisor's—a reasonable response to the bad faith conduct of the other party. Wrested from him by duress, the promisor's apparent agreement should be no more binding—morally or legally—than the promise of a ransom payment, made to obtain the release of a kidnap victim and then repudiated once the victim has been released. No amount of reliance, the promisor will argue, can legitimate a promise procured—metaphorically at least—at gunpoint.

But Cases 6 and 7 both assume a kind of factual purity that in real life might be hard to come by. Suppose instead a modifying agreement made in circumstances of some ambiguity:

Case 8. The promisee has requested a price increase for her services to be performed pursuant to an already existing contract because she has received an offer of a higher price for those services from another source. She does not overtly threaten a breach (although accepting the other offer would be inconsistent with her performance of the existing contract, and such a threat might therefore be seen as implicit). She does, however, clearly communicate her belief that a price increase would be appropriate, in the circumstances, and strongly urges the promisor to agree.⁴³⁰ If he does so, can he later renege on that promise with impunity? Or should it be enforced?

In this case, lack of fresh consideration might make the modification unenforceable. The promisee might also appear to have acted in bad faith. For one or both of those reasons, the modification agreement might be unenforceable. And the promisor might have agreed to it in the belief—or at least the hope—that such would be the case. On the other hand, the promisee will have relied on the promised modification, at least by forbearing to breach (in a situation where

contract voidable), 176 (explaining when a threat is improper). See, e.g., *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 535 (N.Y. 1971); *Kelsey-Hayes Co. v. Galtaco Redlaw Castings Corp.*, 749 F. Supp. 794, 797 (E.D. Mich. 1990).

430. The facts of Case 8 are intended to mimic those of *Schwartzreich v. Bauman-Basch, Inc.*, 131 N.E. 887 (N.Y. 1921).

breach might have been "efficient"),⁴³¹ and possibly in other ways as well. And the promisee's conduct is not so clearly coercive as it was in Case 7. Can the promisor in Case 8 justifiably claim that his reliance on the non-liability rule trumps the promisee's reliance on his promise of a modification?

In its determined straddling of the fence, Case 8 may sound like a typical law-school exam question, designed to elicit an "on the one hand this, on the other hand that" response. And indeed it is. But it probably also mirrors a lot of real-life transactions, where the iron hand of potential coercion may or may not be awaiting within the velvet glove of persuasion.⁴³² One is tempted to call Case 8 a draw, but even if a law student (or teacher) could have that luxury, a court would not. How should this seeming stalemate be broken?

In order to test the relative weight of the two forms of reliance, it may help first to imagine the case without any reliance by the promisee. Suppose for the moment, then, that the promisor does indeed manifest apparent assent to the modification agreement, and does so formally (in a signed writing, let us assume) so the fact is not at all in doubt. But he very quickly repents, and retracts that assent, before the promisee can have relied on that agreement in any substantial way. Would the modification agreement be binding?

If the modification is subject to a consideration requirement, then on the facts as stated it fails, and for that reason alone would be unenforceable.⁴³³ Even apart from lack of consideration, the modification might be seen as having been coerced, and tainted by bad faith or duress on the promisee's part. If the promisor argues that he initially relied on the protection of the legal rule, this seems (in light of his prompt retraction) to add little to his claim not to be bound; that claim basically stands or falls on the strength of his underlying doctrinal defense: lack of consideration, bad faith or duress protect him from liability on the modification.

But now suppose that the promisor does not retract promptly,

431. If the gain from the alternative offer were high enough to leave the promisee with some excess after the promisor had been compensated for her breach, the breach would have been "efficient" under standard economic analysis. RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 119 (4th ed. 1992).

432. This seems to have been the situation in *Schwartzreich v. Bauman-Busch, Inc.*, 131 N.E. 887 (N.Y. 1921). The court recounts both versions of the crucial conversation, plaintiff employee's and defendant employer's. The employee sounds a little more coercive in the employer's version, but in neither account does the employee in so many words threaten to breach and accept the competitor's offer if he is not given the requested raise.

433. We are continuing to assume, as with Case 6, that the agreement as modified does not fall within the unanticipated circumstances rule of Restatement (Second) section 89(a). See *supra* note 425.

but waits until the promisee has finished her performance (or at least until the promisor is less vulnerable to the harm that might result from her breach). The promisor once again can assert a reliance claim, that he entered into the modification only to avoid substantial injury, and did so in reliance on the law's protection. He appeared to submit to the promisee's demand out of necessity, in order to obtain what he was entitled to under the original agreement. He did so in reliance on the law's protecting him against liability at the point when repudiation of the modification became a practical possibility. When the kidnap victim has been released, the promisor will argue, the promised ransom no longer has to be paid.

The problem with that argument is, of course, that the promisee now has a reliance claim of her own. She continued to perform as originally promised in a situation where breach for her might have been, if not the "right" thing to do, at least the more "efficient" course of action. And on the facts of Case 8, the promisor never signaled to the promisee that his agreement to the modification was anything other than voluntary and genuine, so her reliance on his apparent commitment may have been both substantial and reasonable. If he had resisted initially, maybe she would have applied more pressure by overtly threatening breach, but maybe she would have just backed off. Since he didn't put her to that test, we don't know. And if the promisor intended from the beginning to renege on the modification as soon as it was tactically safe to do so, then he was himself guilty not merely of bad faith, but of fraud.

In the Case 8 situation, it is probably not surprising that courts have gone different ways. The more the promisee appears to have threatened breach in a situation where the promisor had little practical choice but to submit, the more likely we are to favor the promisor, who may have relied on a rule of law to protect him when he pretended to assent.⁴³⁴ The more the promisor appears freely to have gone along with a modification that from the promisee's perspective seemed to be fair, the more apt we are to favor the promisee, who may have forgone other courses of action in reliance on the promisor's apparently genuine consent.⁴³⁵ Either way, the choice is ultimately between two forms of reliance, each with a potentially legitimate claim to protection, in a situation where one must yield to the

434. See, e.g., *Austin Instrument, Inc., v. Loral Corp.*, 272 N.E. 2d 533 (N.Y. 1971).

435. See, e.g., *United States ex rel. Crane Co. v. Progressive Enter.*, 418 F. Supp. 662, 664-65 (E.D. Va. 1976); but cf. *T&S Brass and Bronze Works, Inc. v. Pic-Air, Inc.*, 790 F.2d 1098, 1106 (4th Cir. 1986) (buyer's failure to make formal protest did not bar its later objection to modification agreement, where seller had acted in bad faith in demanding that agreement).

other.

The preceding cases have all involved two types of reliance that might be regarded as different, and for that reason distinguishable: Reliance by one party on a rule of law as compared with reliance by the other on an expressed manifestation of intention. Whichever way that cuts, it might conceivably be seen as presenting an apples/oranges problem. Let us now address a few situations where the competing forms of reliance are more directly comparable—apples vs. apples, as it were.

Case 9. Suppose that two parties have initially made a written agreement to exchange performances in the future. Among its various provisions, that agreement declares that any modification of its terms must be in writing and signed by both parties. Despite the presence of this “no-oral modifications” (hereinafter “NOM”) clause, the two parties do later agree, orally, to modify their agreement in some way. This might be a “one-sided” modification, favoring one party, in which case the legal issues raised by that aspect of the agreement would be those discussed above. But assume for the sake of discussion at this point that the modification does not lack consideration. Each party gets something new out of it—an additional segment of performance, say, in return for an additional amount of payment. The modification might also appear to be subject to some statute of frauds, U.C.C. or otherwise; again, this would raise legal issues similar to those we have already encountered. But here there is an additional factor we have not addressed until now. What legal problems will flow from the presence of the NOM clause in the original written agreement?

Here again, we have potentially different applicable rules, depending on the situation. If the transaction falls outside of Article 2, and general contract common law applies, the NOM clause will probably be ineffective. The parties who had the power to make an agreement originally also have the inherent power to change it, even if that entails in effect overriding their own earlier agreement. On the other hand, if Article 2 applies, then under section 209(2) the NOM term will be at least initially effective.⁴³⁶

Suppose, then, that after such an oral modification is made, one of the parties who apparently agreed to it—call him the “promisor,” to follow the pattern we have been using—claims later not to be bound by that agreement, and in support of that claim argues that he relied on the NOM clause to insulate him from obligation. The

436. The section does require that the provision be separately signed if the parties are not both merchants; we will assume here that this formality, if applicable, has been complied with.

promisee has expressly agreed that such an agreement should not be binding unless it is in writing and signed, which this one is not. Here the promisor in attempting to escape liability is relying, not on some underlying rule of law, but on the express agreement of the other party that oral agreements shall not be binding between them. Is this a reliance claim that should prevail?

If Case 9 arises under the common law regime, then the promisor is attempting to use his reliance to achieve a result that (as indicated above) the law probably would not otherwise give him. This is not by itself conclusive, obviously, since much of the thrust of our discussion so far is that reliance may trigger different results than would obtain under otherwise applicable rules. What probably *is* conclusive is that the promisor is claiming that he relied on the promisee's express agreement in the NOM clause that writing would be a *sine qua non* for modification. However, that earlier agreement is one which both the promisee *and the promisor* were apparently later willing to ignore. Once the promisor knows that the promisee has changed her mind about the importance of a writing, he cannot then be relying on that earlier expression of intention—particularly when he is simultaneously manifesting the same change of heart himself. Thus, the reliance claim not only fails to trump the later agreement, on closer examination it evaporates.

But suppose that Case 9 occurs in a sale of goods situation, so that Article 2 applies. Now the legal tables are turned, to some extent. In section 2-209(2), the U.C.C. declares that when an agreement contains a NOM clause, that clause is effective. The agreement "cannot otherwise be modified or rescinded."⁴³⁷ However, in section 2-209(4), the U.C.C. provides that an attempted modification which violates the NOM clause can still "operate as a waiver."⁴³⁸ Furthermore, such a waiver will under section 2-209(5) be non-retractable, if its retraction would be unjust in light of "a material change of position in reliance on the waiver."⁴³⁹

In the Article 2 version of Case 9, we have thus come to a situation very similar to our earlier Case 6. In agreeing to an oral modification, the promisor may assert, he was relying on both the NOM clause itself (as an expression of the other party's intention to disregard oral modifications) and on the rule of law that upholds NOM clauses (section 2-209(2)). But the promisee, seeking to uphold the oral modification, has her own pair of reliance claims, each of which trumps its counterpart. Where the promisor was relying on the origi-

437. U.C.C. § 2-209(2) (1995).

438. U.C.C. § 2-209(4) (1995).

439. U.C.C. § 2-209(5) (1995).

nal NOM clause as an expression of the promisee's intention (as well as his own), the promisee relied on the later oral modification agreement as an expression of the promisor's willingness (and her own as well) to *disregard* the NOM clause. And where the promisor was relying on the rule of section 2-209(2), the promisee—once she has changed her position in reliance on the later agreement—can claim that she relied on the explicit rule of sections 2-209(4) and (5).⁴⁴⁰

Case 10. Our discussion of Case 9—like the earlier discussion of cases involving the statute of frauds—tacitly assumed the reality of the agreement at issue. Suppose, however, that this fact is contravened. Case 10 is like Case 9, except that the existence of the oral agreement is in dispute. The “promisor” does not admit making the later oral agreement; he denies it. (If he is telling the truth, then the terms “promisor” and “promisee” no longer accurately describe the parties, but we will retain those appellations to avoid confusion.) The promisor argues that to save the trouble and expense of having to litigate on the merits (and also to avoid the risk of losing that litigation), he ought to be relieved of even the obligation of responding to the promisee's claim. In the absence of a writing, he asserts, the modification—*whether or not* it was actually made—should simply be ineffective.

Here we have a different kind of reliance claim than any we have yet discussed. The promisor claims that in making the original agreement, he relied on the NOM clause to insulate him from any later claim that an oral modification was agreed to. Having induced him to contract originally on the basis of that clause, he argues, the promisee should not now be free to disregard it, and force him to respond to such a claim. His reliance claim now has nothing at all to do with his agreeing to the *modification*; he denies having ever done so. His reliance claim relates rather to the *original contract*, to which—he now asserts—he would not have agreed if it had not appeared to pro-

440. In *Brookside Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029 (S.D. Tex. 1995), a seller of basil leaves attempted to enforce an oral modification agreement providing for a higher price to be paid by the buyer in return for additional processing of the leaves by the seller before delivery. Buyer moved for summary judgment based on the NOM clause and the statute of frauds, U.C.C. section 2-201. The buyer had assertedly agreed to memorialize the modification in writing, but had not done so; both parties nevertheless had proceeded to perform under the agreement as revised. The court invoked principles of waiver, estoppel and part performance to deny the buyer's motion for summary judgment, and instead granted the seller's motion for partial summary judgment on its claim for increased compensation. In a comment to the proposed revision of U.C.C. section 2-209, the *Brookside* case is cited for the proposition that under the revised Article 2, a NOM clause will continue to be subject to waiver based on language or conduct inconsistent with the clause, where reasonable, good faith reliance is thereby induced. U.C.C. Revised Article 2, *supra* note 148, at 34-35.

tect him against just this eventuality.

As we have seen, the common law was not generally hospitable to NOM clauses, perhaps for reasons having to do more with logic or views about contractual autonomy than with concern with protection of reasonable detrimental reliance. The U.C.C., however, as part of its friendliness to commercially reasonable agreement-making, endorses the NOM clause in general terms, while at the same limiting effectiveness of the clause to situations where the modifying agreement has yet to be substantially relied on by the party attempting to enforce it. But what of the promisor's claim in Case 10 that he substantially and reasonably relied on the NOM clause to avoid just what he now faces—a factual dispute as to the existence of an oral modification agreement? But for the NOM clause, the promisor may argue, he either would not have entered into the original agreement at all, or else would have imposed other kinds of controls on this risk, such as broader powers of termination, internal safeguards, etc. For her part, the promisee asserts that the modification agreement was really agreed to by the promisor, and that she has substantially and reasonably relied on it. Compared to that reliance claim of the promisee, how strong is the promisor's claim to be entirely exempted from this dispute?

God only knows. No, really. Because with divine omniscience, we could be absolutely certain whether the promisor is telling the truth. If we were sure that he was, we would happily relieve him of the burden of a trial (as well as the risk of being wrongly disbelieved). On the other hand, if we knew for sure that the *promisee* was telling the truth, we should be reluctant to insulate the promisor against her claim merely because of her earlier adherence to a clause which the parties may well not have discussed, and to which the promisor later appeared indifferent.⁴⁴¹

In the final analysis, there may be no satisfactory lasting resolution of this tension between the promisor's desire for stability and

441. There are two additional factors which might figure in a case like this. One is the possibility that the parties have established a course of performance by which modifying agreements are made orally and promptly relied on, but consistently reduced to writing at some future point. Such a course of performance balances the legal and practical tensions created by the NOM clause, and could appear to increase the credibility of the promisee's story that an oral agreement was made despite the NOM clause in the original contract.

The second factor is the agency issue. A NOM clause—along with other devices, such as a strong merger clause or specific limitations on agents' authority to vary the written agreement—is often used as a device to avoid liability for unauthorized changes agreed to by agents. This is a rational goal, given the business enterprise's need to rely on all kinds of agents to get its work done. On the other hand, one might resist having the other party pay the price in the form of a forfeiture, where oral "change orders" have been relied on by her.

predictability, and the promisee's claim to be protected in her reasonable reliance on the promisor's commitment to a modifying agreement. Depending on the relative strength of the equities, courts will differ with each other, and even with themselves from case to case. Thus, in ruling that an NOM clause stood as a "stone wall" in the path of one party's attempt to prove a modification agreement, the Pennsylvania Supreme Court in 1965 declared that this must be the rule. "Otherwise," it lamented,

written documents would have no more permanence than writings penned in disappearing ink. . . . [C]ontractual obligations would become phantoms, solemn obligations would run like pressed quicksilver, and the whole edifice of business would rest on sand dunes supporting pillars of rubber and floors of turf. Chaos would envelop the commercial world.⁴⁴²

The same language was quoted approvingly (by its author) just three years later in another Pennsylvania Supreme Court decision, but this time in a dissent. In permitting enforcement of an oral modification agreement, the majority opinion in that later case pointed out that under the U.C.C. a NOM clause can be waived, and that it will be considered waived "when its enforcement would result in something approaching fraud."⁴⁴³ When an oral modification agreement collides with a NOM clause, the court continued, "the effectiveness of a non-written modification . . . depends upon whether enforcement of the condition is or is not barred by equitable considerations, not upon the technicality of whether the condition was or was not expressly and separately waived before the non-written modification."⁴⁴⁴

The point of Case 10 seems to me to be not that either form of reliance must necessarily prevail.⁴⁴⁵ It is rather that each party in such a case might justifiably claim to have relied on the words and conduct of the other, so that resolution of their dispute must involve a comparison of both their respective actions in reliance. This lesson, if accepted even *arguendo*, will permit us to confront head-on the minotaur that has all along been waiting at the end of this labyrinth: the parol evidence rule.

442. C.I.T. Corp. v. Jonnet, 214 A.2d 620, 622 (Pa. 1965) (Musmanno, J.). The court held that the NOM clause would prevent proof of the modification unless its proponent could show an express agreement to waive that clause (rather than simply an oral modification agreement).

443. Universal Builders v. Moon Motor Lodge, Inc., 244 A.2d 10, 16 (Pa. 1968) (citing 5 WILLISTON ON CONTRACTS § 689, at 306-07 (3d ed. 1961)).

444. *Id.*

445. Although the U.C.C. by referring specifically to the promisee's actions in reliance on the modification/waiver seems at least by implication to be stating that such reliance deserves priority in protection as a matter of law.

C. Understanding Ourselves: Liars and Reliers

Picking up the thread of the discussion immediately above, I shall proceed in this section to examine the intersection of the parole evidence rule and the reliance-protection principle. At the beginning of this Part IV, I proposed that attention to this principle might help us understand ourselves better. In this section I will try to explain how that might be so. Like most of the commentators whose work is cited and discussed in these pages, I am a full-time law teacher, a former law student, and a one-time practicing lawyer. The mere fact that you are reading this article at all strongly suggests that you are one or more of those things yourself.⁴⁴⁶ You and I are therefore part of the American legal establishment—the creators and custodians of the legal system, including its body of contract law. And you and I and the other members of that establishment are, I believe, deeply and perhaps irredeemably divided not only among ourselves but often within ourselves about the dilemma presented by a head-on confrontation between the policies served by the parole evidence rule and the principle of promissory estoppel.

In choosing the parole evidence rule for discussion at this point, I am well aware that it hardly represents one of promissory estoppel's triumphs. In the various cases analyzed above—involving lack of consideration, statute of frauds, modification, etc.—reliance protection (usually under the rubric of “promissory estoppel”) has carved out for itself a well-developed and significant role in the contract rule system. Even a NOM clause under the U.C.C. will be trumped by reliance.⁴⁴⁷ When we come to the parole evidence rule, however, a very different situation obtains.

The parole evidence rule has taken different forms and been variously explained over the years.⁴⁴⁸ It is generally understood to bar admission and consideration of evidence of extrinsic agreements made prior to or contemporaneously with a formal written agreement, when the parties to that written agreement have intended it to be the complete and exclusive statement of their contract.⁴⁴⁹ Based on

446. You might even be a judge, in which case I modestly but strongly urge you to keep reading.

447. While the common law rule denying effect to such clauses doesn't expressly depend on the presence of reliance, the cases reaching that result generally do involve reliance by the party seeking to enforce the modification. See FARNSWORTH, CONTRACTS, *supra* note 16, at § 7.6.

448. An excellent discussion of the parole evidence rule, along with citations to the various standard commentaries, can be found in *Farnsworth, Contracts*. See *id.* at §§ 7.2-7.5.

449. The Restatement (Second) version of the parole evidence rule can be found in sec-

the assumption that such a writing necessarily supersedes or excludes all such other agreements, the parol evidence rule in effect requires the court as a matter of law to disregard all evidence ("parol" evidence, because usually oral rather than written) of their existence.⁴⁵⁰

A possible occasion for the application of promissory estoppel may arise if one of the two parties to a formal written agreement asserts that both parties mutually agreed to something not expressed in that writing (even, perhaps, in conflict with its express provisions), and that she relied on the other party's assent to that extrinsic agreement when entering into the contract and commencing to render her performance. Of course, the other party may well deny that any such extrinsic agreement existed. Whether he does or not, he may argue that its existence is legally irrelevant, because the parol evidence rule requires the writing *and only the writing* to be taken as expressive of the parties' agreement. In its apparent exaltation of writing over other means of expressing agreement, the parol evidence rule bears an obvious family resemblance to the statute of frauds, which requires a written, signed agreement for some types of contracts to be enforceable.⁴⁵¹ In an attempt to insure that a written agreement will be regarded as "fully integrated" and thus protected by the parol evidence rule, drafters often employ a "merger clause."⁴⁵² Such a clause

tions 209-218. Article 2 of the U.C.C. has another version in section 2-202. See FARNSWORTH, *CONTRACTS*, *supra* note 16, § 7.2 at 466.

450. As Professor Farnsworth observes, the parol evidence rule may be seen as having an "evidentiary" or a "substantive" function. See FARNSWORTH, *CONTRACTS*, *supra* note 16, § 7.2 at 468. For procedural purposes (e.g., choice of law), the rule is commonly treated as "substantive." See *id.* The evidentiary view of the rule—that written evidence is inherently more trustworthy than oral—"once had currency," Farnsworth notes, but is now out of fashion. *Id.* at 467. Since Professor Arthur Corbin's full-scale reexamination of the rule in his treatise, it is more conventional to explain the rule, as Farnsworth does, in terms of the parties' shared intention "to simplify the administration of the resulting contract and to facilitate the resolution of possible disputes by excluding from the scope of their agreement those matters that were raised and dropped or even agreed upon and superseded during the negotiations." *Id.* at 469. Of course, the problem with Corbin's approach is that it simply redefines the court's dilemma: How can we surely know the parties' true intent, if we must look only at the writing? Conversely, if permitted to look elsewhere, have we necessarily deprived the writing of what may have been its intended result?

451. There are equally obvious differences, of course. The statute of frauds, particularly in its more modern form does not require the entire agreement to be expressed in the writing, nor preclude recourse to extrinsic evidence. See, e.g., U.C.C. § 2-201(1) (1995). On the other hand, the parol evidence rule imposes no requirement that the parties in fact adopt a written version of their agreement; it only applies to the extent that they have chosen to do so.

452. One version of such a clause, from long-ago memory: This Contract represents the entire agreement of the parties with respect to the subject matter thereof, and all prior negotiations and agreements with respect thereto, written or oral, are merged herewith

is functionally related to the NOM clause, and indeed the two clauses are likely to both be employed by a drafter intent on insuring—to the extent legally possible—that the written agreement *alone* will be taken as expressing the contract of the parties.⁴⁵³ As we have discussed above, both the statute of frauds and the NOM clause are likely to bow to substantial, foreseeable, detrimental reliance. In light of their obvious similarities, it might be thought likely that the parol evidence rule would follow suit.

And so it appeared at the beginning of the last decade.⁴⁵⁴ Despite the predictions of some commentators, however,⁴⁵⁵ the projected victory of promissory estoppel over the parol evidence rule has for the most part been, as Professor Farnsworth observed a few years ago, a non-event.⁴⁵⁶ The parol evidence rule is a rule so riddled with exceptions and so hemmed in by qualifications that its complexity is legendary.⁴⁵⁷ Nevertheless, it seldom yields to the direct application of promissory estoppel.⁴⁵⁸ What does this state of affairs tell us about the

and superseded hereby.

453. Like any “boilerplate” clause, the merger clause may or may not achieve its intended purpose. The more “modern” parol evidence rule regards such clauses as evidence on the issue of intent-to-fully-integrate, but not necessarily conclusive on the point. RESTATEMENT (SECOND) § 209 cmt. b; 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 578 (1960). Many courts will, however, give them binding effect. *See* FARNSWORTH, CONTRACTS, *supra* note 16, § 7.3 n.35. In the course of the ongoing revision of Article 2, after the parol evidence rule was tentatively revised to exclude consumer contracts from its operation, an effort was made to revise the Code’s parol evidence rule to provide that merger clauses must be given conclusive effect in non-consumer contracts; as of this writing that effort apparently has failed. *See* U.C.C. Revised Article 2, Sales, xxiv, 19 (Discussion Draft April 14, 1997); U.C.C. Revised Article 2, *supra* note 148, at 22-23 (presumptive but not conclusive effect of merger clause on issue of integration will be treated in comment to revised section 2-202).

454. *See, e.g., Metzger, supra* note 51, at 1454-55.

455. In a 1981 article, I declared that we could “confidently expect” that just as the statute of frauds had proven vulnerable to promissory estoppel, so would “another bastion of form-over-substance, the parol evidence rule . . . fall under similar attack.” *Proliferation, supra* note 3, at 77-78. I have been occasionally flattered to see this statement quoted, much as the editors of the *Chicago Tribune* must periodically be flattered by yet another reproduction of the 1948 photo of a grinning Harry Truman holding aloft their famous headline, “DEWEY DEFEATS TRUMAN.”

456. Farnsworth, *supra* note 59, at 219-20.

457. In this area, the obligatory quotation is from JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 390 (1898): “Few things are darker than this, or fuller of subtle difficulties.” *See, e.g.,* Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 MONT. L. REV. 93 (1994).

458. While clearly of the view that promissory estoppel should be stronger than the parol evidence rule where the elements of the former are present, Professor Eric Holmes in his comprehensive review of the case law is unable to muster many even arguable examples of that principle. *See, e.g.,* Holmes, *supra* note 19, at 279-82, 303-04, 309, 361-64. In *Starr v. O-I Brockway Glass, Inc.*, 637 A.2d 1371 (Pa. Super. Ct. 1994), plaintiffs, a mar-

parol evidence rule, about promissory estoppel, and about our vision of contract law?

At the outset, it has been suggested that the very complexity of the present-day parol evidence rule offers at least a partial explanation for its apparent indifference to reliance.⁴⁵⁹ When one of the parties to a written contract offers evidence of a prior or contemporaneous extrinsic agreement on which he appears to have strongly and detrimentally relied, there is often some established doctrinal basis on which that evidence might be admitted, despite the parol evidence rule. The evidence merely explains an otherwise ambiguous agreement;⁴⁶⁰ it reflects an applicable trade usage, or a relevant course of dealing between the parties;⁴⁶¹ it reveals a condition precedent to the

ried couple, had contracted to sell land to the defendant, which intended to build a warehouse there. The written contract of sale was expressly conditioned on the buyer's ability to close on other adjacent property and proceed with the contemplated development. The buyer ultimately abandoned its plans and refused to complete the purchase. The sellers sued for damages alleged to have resulted from their yielding possession to the buyer in response to a request to that effect made on the date the contract was signed, an act which they asserted had caused losses in the operation of their business; they also sought specific performance of the contract to purchase. The trial court granted buyer's motion for summary judgment, on the ground that performance of the purchase agreement was completely discretionary with the buyer, and that proof of the buyer's request that the property be vacated was barred by the parol evidence rule. On appeal, the Pennsylvania Superior Court held that summary judgment was improper. Performance of the contract was not completely discretionary with the buyer; the implied obligation of good faith imposed on it a duty to use reasonable efforts to bring about the conditions to performance, making the claim for specific enforcement a triable one. As to the buyer's request that the sellers vacate the property, this also presented a triable issue of material fact, because the sellers' justifiable reliance on such a request could be the basis for an "equitable estoppel" to assert the parol evidence rule. From the court's statement of the case, it seems that the buyer's request might have been made after the signing of the written contract (even if made on the same date), in which case the court could have invoked the traditional view that the parol evidence rule only applies to extrinsic agreements or statements made before or simultaneously with the signing of the integrated writing. Instead of attempting to invoke such a "technical" counter to the parol evidence rule, however, the court simply and clearly stated that in this case the parol evidence rule should bend to a reliance-based estoppel.

459. See, e.g. Metzger, *supra* note 51, at 1461-62; Barnett & Becker, *supra* note 104, at 474.

460. See RESTATEMENT (SECOND) § 214(c). See, for example, *DeJong v. City of Sioux Center*, 980 F. Supp. 1010, 1016 (N.D. Iowa 1997), in which a federal court first determines that Iowa would not apply promissory estoppel to permit plaintiff shopping center tenant to show an oral promise to complete mall construction in time for opening by specified date where agreement between parties was fully integrated writing, then goes on to hold plaintiff's evidence on the point was admissible anyway because the writing itself was ambiguous as to the center's agreed-on opening date.

461. See U.C.C. § 2-202(b) (1995).

operation of the contract at issue;⁴⁶² it shows that fraudulent misrepresentations were made;⁴⁶³ it indicates that what appeared to be an integrated written agreement was not an integration at all, or at least not a complete one.⁴⁶⁴ The presence of detrimental reliance may influence the court's decision to accept one of these doctrinal justifications for the admission of parol evidence. But nothing in the rules requires that such reliance be identified by the court as a contributing cause of that decision, so if reliance is indeed protected, it is tacitly and perhaps incidentally.

It also may be protected by the Lord Nelson, turn-a-blind-eye method.⁴⁶⁵ Some commentators have noted that often a relied-on oral understanding appears to have been enforced without any discussion of the parol evidence rule, even though the parties had apparently adopted a written agreement which might well have qualified for protection under that rule.⁴⁶⁶ This seeming tendency to overlook the possible application of the parol evidence rule⁴⁶⁷ suggests that it may be weaker in practice than it appears to be in the hornbooks.⁴⁶⁸

But those are only partial explanations at best, and they may also be partially rationalizations. The fact remains that although promissory estoppel has been seen by many as potentially strong enough to overcome the parol evidence rule, the decisions generally do not bear that out, at least not yet. Why not? As various attempts to explain the rise of promissory estoppel have demonstrated, it is very hard to identify with certainty the causes of such a legal event.⁴⁶⁹ And just as "proving a negative" is usually thought to be a more onerous burden of proof, identifying the causes of a *non*-event seems a particularly daunting task. All I can do is offer some suggestions of the factors

462. See RESTATEMENT (SECOND) § 217.

463. See FARNSWORTH, *supra* note 16, § 7.4, at 483 (arguing for broad rather than narrow view of fraud exception to parol evidence rule).

464. RESTATEMENT (SECOND) § 214(a), (b).

465. The reference is to Lord Nelson's action at the Battle of Copenhagen, ignoring a signal to disengage (with victory as the ultimate result) on the excuse that, having only one good eye, he had not seen it. As Professor Scott Burnham has reminded me, Professor Corbin used this analogy in discussing various judicial responses to standardized forms. See 1 CORBIN, *supra* note 453, at § 128.

466. See Barnett & Becker, *supra* note 104, at 475 n.158.

467. This phenomenon is observable in other contexts as well. See, e.g., Gibson, *supra* note 140, at 704-06, describing courts' indifference to Article 2 when deciding *Drennan*-type cases on promissory estoppel basis.

468. Of course, in some of those cases the issue may have been raised and dealt with below; in others, there may simply have been a failure of lawyering—nice for the other side in that case, but not something later litigants can count on.

469. Feinman, *supra* note 178, at 1374; Metzger & Phillips, *Promissory Estoppel and the Evolution of Contract Law*, *supra* note 139.

that seem to me most probably at work here.

One of those is simply the spirit of the times. When we survivors of the last decade think back over "the Eighties," we are apt to remember boom times on Wall Street, corporate mergers and hostile takeovers, the resurgence of political and religious conservatism, the collapse of international communism and the corresponding turn toward free-market capitalism, and the decline of welfare-state liberalism. Without wishing in the slightest to caricature either proponents or opponents of one legal doctrine or another, it seems fair to suggest that the tenor of those recent times was much more hospitable to rugged individualism and pursuit of economic self-interest than to visions of communitarian interdependence and mutual trust. In the commercial law area, many courts in the Eighties and early Nineties have seemed disposed to revert to a highly formalistic vision of contract law, more typical of the classical, early twentieth century era than of the more recent, modern period.⁴⁷⁰ As one of the "formalist" contract doctrines, the parol evidence rule would naturally be a beneficiary of this judicial trend. Conversely, with the tide of modern contract law apparently ebbing, it seems no particular reflection on promissory estoppel to suggest that its boat may have been lowered along with many others.

As the preceding comment suggests, it is possible to view promissory estoppel and the parol evidence rule—and probably many other contract doctrines as well—in political terms. Not just political in the Republicans-versus-Democrats sense,⁴⁷¹ but political in terms of the values those rules may serve. Despite the apparent neutrality with which contract rules are stated and ostensibly applied, study of court opinions over time strongly suggests that contract decision-making frequently involves a tug-of-war between conflicting values or goals—between abstract law and particularized equity, between an elitist and a populist view of law and the legal system, between at least a professed neutrality and a more-or-less conscious balancing of interests, between individualism and communitarianism, between amorality and morality.⁴⁷²

470. See generally Mooney, *supra* note 58, at 1133.

471. Although maybe in that sense, too. See *infra* note 497.

472. For many commentators of the present day, the dominant goal of contract law seems to be efficiency. Because efficiency appears to mean (or to symbolize) so many different things to different people, it's hard to know how its counter-value should be denominated. Obviously efficiency could be seen as opposed by *inefficiency*, but presumably few would regard that as an end in itself. (Maybe I underestimate the size of what would presumably be the Luddite constituency?) The text suggests that individualism can be seen as opposed to communitarianism (or perhaps altruism); most economic analysis appears to assume a free market of rational actors motivated by their individual self-interest,

These various values do not always sort themselves out in the same pattern, and in differing cases may pull in different ways. Like other commentators before me, however, I see a tendency for them to coalesce in two opposing clusters. One of those clusters is highly congruent with what we have called "classical" contract law; the other is more likely to be reflected in contract law of the "modern" period. And while the parol evidence rule has survived in one form or another through both of these periods and up to the present day, it exhibits strongly the characteristic features of classical contract law, stressing as it does the dominance of writing over all other forms of expression, of the drafter over all other actors, and thus—inferentially at least—of the lawyer over the non-lawyer, and of the counseled over the non-counseled.

In light of the parol evidence rule's position at the extreme classical end of the contract law spectrum, it is not surprising that many commentators have had extreme views of its merits and demerits. Some have been strongly dismissive, professing to see no demonstrated efficacy in the rule.⁴⁷³ Others have been equally vehement in their support.⁴⁷⁴ Professor Scott J. Burnham has recently described the chasm between these two world-views:

In one view of the world, things should function tidily. People should think before they act, seek advice when out of their depth, know what they are getting into, read all documents, and write down all their agreements. If they do not, the law will see that they suffer the consequences. People may be hurt, but they—and others who learn of their misfortune—will profit from the experience, and the world will become tidier. The drawback of this approach is that it

so maybe that dichotomy addresses the law-and-economics orientation. Cf. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1722-24 (1976), describing and contrasting individualism and altruism. As the text above may suggest, Professor Kennedy's article has had a strong, if gradual, influence on my thinking about contract law and the role of law in society.

473. See, e.g., the "well-known judicial tirade" (the phrase is Professor Farnsworth's) against the parol evidence rule, delivered by Judge Jerome Frank in *Zell v. American Seating Co.*, 138 F.2d 641, 647-50 (2d Cir. 1943). Writing again in 1949, Judge Frank stuck to his guns, despite efforts by "[m]y good friend Professor Karl Llewellyn," to persuade him of the social utility to be found in the fact that "carefully prepared, lawyer-made documents" will frequently "forestall litigation." JEROME FRANK, *COURTS ON TRIAL* 30-31 (Atheneum ed. 1963) (1949). Perhaps "skilled legal paper-work" does have that effect. Judge Frank responded, but it "should be kept in mind" that "economically powerful corporations" that employ "exceptionally competent trial lawyers" will often prevail because less powerful adversaries are "unable to finance litigation with those giants," or are fearful of retaliation in various forms. *Id.*

474. See, e.g., *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (1988) (opinion by Judge Kozinski excoriating California courts for apparently loosening parol evidence rule); Olivia W. Karlin & Louis W. Karlin, *The California Parol Evidence Rule*, 21 SW. U. L. REV. 1361 (1992).

fails to recognize the human side of the law, the need for fairness. If we expect formality every time, there is no humanity.

In the other view of the world, people screw up. They grope their way through a complex and demanding world, doing the best they can, which is often not good enough, and they fall into traps. When they do so, the law will examine the route they followed and the nature of the particular trap. If the particular story is compelling enough, they will be rescued. Whether others will also be rescued cannot be predicted—it is a function of how compelling their story is. The drawback of this approach is that it fails to recognize the stable side of the law, the need for predictability. If we look to context every time, there is no rule of law.⁴⁷⁵

One way to bridge the chasm, or at least live more comfortably next to it, is to bifurcate the contracting universe by splitting off “consumer contracts.” Since the typical merger clause will be a “boilerplate” provision that no consumer is going to even look at, much less comprehend, it has been suggested that the parol evidence rule should apply only weakly if at all where consumers are concerned.⁴⁷⁶ As regards contracts between consumers and merchants, we have been aware at least since the days of Llewellyn, Kessler and many others that standardized forms are likely to be employed. Those forms are not likely to be either read or understood by consumers, and a merchant should not as a matter of policy be allowed to impose completely its untrammelled will on the consumer, merely because the writing reflects the merchant’s version of what it wants their contract to provide.⁴⁷⁷ Various doctrines have been employed to protect consumers in this situation, such as the notion of unconscionability⁴⁷⁸ and the “reasonable expectations” doctrine.⁴⁷⁹ In light of these other de-

475. Burnham, *supra* note 457, at 141-42. Gilbert & Sullivan mavens will understand why Professor Burnham prefaces this passage with a quotation from Private Willis’s song from Act 2 of “Tolanthe,” declaring from the perspective of Victorian England

— that every boy and every gal,

That’s born into this world alive,

Is either a little Liberal,

Or else a little Conservative!

Id. at 141. Or, as someone else has observed, the whole world is divided into two groups: Those who think the world is divided into two groups, and those who think it isn’t.

476. See *supra* note 453 (regarding the prospective revision of U.C.C. section 2-202 to except consumer contracts from the application of the Code’s parol evidence rule).

477. See generally Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

478. See U.C.C. § 2-302 (1995); see also RESTATEMENT (SECOND) § 208. The seminal consumer-unconscionability discussion is of course Judge J. Skelly Wright’s opinion in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

479. See, e.g., *Davis v. M.L.G. Corp.*, 712 P.2d 985 (Colo. 1986) (*en banc*).

velopments, it may indeed resolve part of the tension in this area if the parol evidence rule is seen as having little force where consumer contracts are at issue.

But here as elsewhere choices can have consequences that may not have been intended. If contract law moves toward a parol evidence rule not applicable to consumer contracts,⁴⁸⁰ this will relieve the pressure of formalism in such cases, but perhaps increase it elsewhere.⁴⁸¹ The world of commercial contracts is vast indeed, and contractors range from the vastest and most powerful of international conglomerates to the humblest of enterprises—and indeed to the least powerful of individuals, since employees when contracting with their employers are not typically considered to be “consumers.” Once a transaction is characterized as falling outside the consumer area, should the parol evidence rule permit—indeed, *require*—that a formal written agreement (particularly one with a strong merger clause) be absolutely enforced, no matter what?

Like most legal rules, the parol evidence rule, as it has developed until now, can be explained and justified in a variety of ways. If the parol evidence rule and the principle of promissory estoppel are viewed respectively as the embodiment of “classical” and “modern” contract law, the two doctrines can be seen as another Gilmorean “matter/anti-matter” pair. In the end, one must swallow up the other.⁴⁸² I suggest, however, that the parol evidence rule can also be usefully understood as being, like promissory estoppel, one of the methods that contract law has developed for the protection of reasonable reliance. So viewed, the two are not necessarily antithetical in their goals; they may be complementary. They will sometimes conflict, however, making it necessary in such cases to determine which form of reliance protection should have priority.

In the ideal case for application of the parol evidence rule, two contracting parties jointly negotiate an agreement for the future exchange of performances. They then—possibly, although not necessarily, with the assistance of attorneys on each side—reduce that

480. The phrase “consumer contract” is used here with its conventional meaning of a contract between a merchant and consumer, with all that implies in the way of imbalance of expertise and bargaining power, the use of standardized forms, and the absence of real bargaining over terms. On the other hand, two non-merchants acting in their individual capacities could easily enter into a written agreement apparently intended as an integration; the parol evidence rule might appear to be as relevant there as it is to the ordinary commercial contract between merchants.

481. See *supra* note 453 (discussing a recent attempt to revise the parol evidence rule in U.C.C. Article 2 to make merger clauses in non-consumer contracts conclusive on the issue of complete integration).

482. See the quotation from Gilmore, *supra* text accompanying note 34.

agreement to writing, a writing that describes in detail the performance each is to render, including a specification of any conditions or excusing events, and perhaps also describing some of the consequences of nonperformance or defective performance on either side. Both of the parties adopt that writing (by "signing" it in some fashion) as the definitive expression of their agreement.⁴⁸³ Among its provisions, the writing expressly states, in language that both parties have read, understood and knowingly agreed to, that the writing is intended by both of them to be the complete and final statement of their agreement.

But suppose now that one party thereafter claims, falsely, that she is entitled to some greater or different performance than the writing calls for, because there was an additional agreement to that effect, an agreement not reflected in the writing. Her assertion of this claim is a double breach of trust on her part. It deprives the other party of a primary benefit he expected to receive, her performance as originally promised in their agreement; it also deprives him of a subsidiary benefit, on the expectation of which he had also relied—his expectation that she would not challenge the writing as the authoritative source and definition of both parties' obligations. If the resulting dispute were to end up in court, we would not be surprised to hear the judge in stern, even indignant, language embrace the proposition that the parol evidence rule exists to protect contracting parties from precisely this form of breach of trust. Having so analyzed the case, the judge might then summarily apply the parol evidence rule to relieve the proponent of the writing from having to respond to the other's allegations in a trial on the merits.

The preceding case appears to be a strong one for application of the parol evidence rule, although with more facts it might appear that one of that rule's many exceptions could apply.⁴⁸⁴ But it also presents a strong case for the application of the principle of reliance protection: The opponent of the extrinsic evidence can justifiably argue that by entering into the contract and commencing his performance on the strength of the other party's professed adherence to the written agreement, he has reasonably, foreseeably, and detrimentally relied

483. If the parties are literate individuals, they will just hand-sign or initial the writing; a party that is a corporation or other legal entity can of course only "sign" through the acts of its authorized agents.

484. Thus, the asserted extrinsic agreement might fit within the "oral condition precedent" exception; it might be alleged in such a manner as to come under the heading of "fraud;" it might assert an agreement on matters sufficiently distinct from the primary thrust of the agreement-as-written to qualify as a "collateral agreement" that would not necessarily have been included in the writing. See RESTATEMENT (SECOND) §§ 214(d), 216(2), 217.

on her manifested intention to abide by the terms of that writing, and *only* those terms. The strength of the reliance case will of course vary with the degree of performance or other reliance that has in fact taken place. Frequently, however, the assertion of an extrinsic agreement does not occur until performance on both sides is well underway.

If the preceding represents a strong case for the application of the parol evidence rule, what might a weak case look like? Addressing one by one the factors that make the preceding case so compelling, we might fashion a worse-case scenario out of the following materials: 1) the asserted oral agreement is not a fabrication, but was actually made; 2) the written agreement—including a strong, “legal-ese”-style merger clause—was not specifically created for the particular transaction, but is largely “boilerplate” language used repeatedly by its proponent; 3) the proponent of the writing was represented by an attorney, at least in its drafting, and the other party was not; 4) the party attempting to assert the oral agreement possibly did not read all of the writing, and in any event would not have understood the import of the merger clause if she had read it; 5) the writing does not reflect the oral agreement, but does not specifically negate it either; 6) the party denying the existence of the oral agreement may or may not from the start have intended to repudiate it, but in any event he was well aware that the other party honestly and reasonably believed him to be committed to that oral agreement, notwithstanding the parties’ signing of the written agreement.

I have declared this to be a weak case for the application of the parol evidence rule. It does not necessarily follow, however, that the parol evidence rule would not also apply here. Of course, this case might fall within one of the exceptions to the rule; however, that was equally true of the case previously discussed, the supposedly “strong” case.⁴⁸⁵ In terms of the parol evidence rule and its customary limitations and exceptions, if this is indeed a weaker case for the parol evidence rule, that weakness lies in the area of “intention to integrate.” The parties in the previous case were said to have truly intended the writing to be the only source of their obligations to each other; in the instant case, the *non*-drafting party did not have that intention. But how can we—how could a court—know that? Not from the language of the agreement itself, which speaks as strongly in favor of integration as did the previous example. Only from knowing the surrounding circumstances can we know whether the writing was truly intended by *both parties* to exclude this oral agreement.

This is the paradox of the intention-based parol evidence rule,

485. See *id.*

and of course it is also the end run around the rule that Professor Corbin saw and systematized in his treatise.⁴⁸⁶ You can't justify applying the parol evidence rule, he asserted, unless you know the writing was intended by both parties to have such legal insulation from challenge or even supplementation. You can't know whether they had such an intent unless you hear the parties' stories and decide which one you believe. And, of course, he was right. Even the use of a merger clause cannot *by itself* compel the application of a strong exclusionary parol evidence rule; it is one of many factors, including the nature of the parties, the presence or absence of counsel, and their bargaining situation. To accept Corbin's view of the parol evidence rule is necessarily to sacrifice at least to some extent the complete insulation from dispute that the strongest proponents of the contract-as-written would favor.⁴⁸⁷ If the evidence on the issue of intention includes credible proof that the oral agreement was actually made (which might include a showing of the proponent's reliance on that agreement, as corroborative of its genuineness)⁴⁸⁸, then the court may find that the writing is not a complete and final integration of the parties' agreement after all, and permit the oral agreement to be proven and enforced.

A variety of case-types can be imagined in which the parol evidence rule might be invoked by one of the parties to a written agreement. Some of these are like the case just proposed, in which one party has agreed to the other's writing, not foreseeing that an explicit oral agreement between them could be negated by its omission from that writing. As we have suggested, the issue of integration might be resolved against the proponent of the writing, permitting receipt of the extrinsic evidence. Other cases involve genuine misunderstandings over the meaning of an agreement. In such cases, the extrinsic evidence has a good chance of being admitted as merely explanatory

486. In 3 CORBIN, *supra* note 453, at § 582, Corbin argues that the issue of intent to integrate must be resolved before the parol evidence rule can be applied to exclude evidence, and that extrinsic evidence on the issue of integration is always relevant and admissible for the purpose of resolving that issue. Although Professor Corbin attempts to be judiciously even-handed in his discussion, his feelings about the rule (or at least the way it is often applied) would be obvious even if he did not at one point flatly assert, "It would have been far better had no such rule ever been stated." *Id.* at 455.

487. The rule in this weaker form is far from a non-rule, however. It may still prevent any such evidence from getting to a jury, and in many cases may thus preclude a jury trial at all, if no other triable claims remain. But it will not obviate the need for presentation of at least pleadings and possibly deposition testimony, supplementary affidavits and supporting papers to a judge.

488. Cf. RESTATEMENT (SECOND) § 139(c), declaring that in considering whether to allow reliance to trump the statute of frauds, a court may consider among other things whether the asserted reliance corroborates the making of the asserted promise.

of the writing, particularly if the writing itself appears unclear or ambiguous regarding the matters dealt with in that oral agreement.⁴⁸⁹

But the hardest cases of all involve a head-on collision between two strong but ultimately irreconcilable claims of reliance. Like most head-on collisions, these cases often involve serious injury—even death, of a sort. Many such cases can be found in the reports; I will use as my example one that has recently been the subject of some comment from others, in order to supplement their observations with some of my own. In *Sherrodd, Inc. v. Morrison-Knudsen Co.*, contractor Sherrodd (a family-owned construction firm) sought recovery for work done at the request of defendant COP Construction (which was in turn a subcontractor to defendant Morrison-Knudsen).⁴⁹⁰ Plaintiff alleged that it had originally bid to perform excavation work for COP for a lump sum of \$97,500, based on a representation from an M-K agent that the job involved 25,000 cubic yards of removal. Plaintiff's bid to COP on that basis was accepted, as was COP's bid to M-K (which included plaintiff's bid to it). Plaintiff began work before written contracts were signed, and in the course of performance discovered that the amount of earth to be removed was far more than it had been told. After that discovery, plaintiff was asked by COP to sign a written contract providing that it would be paid the originally bid lump sum of \$97,500 for all its work. Plaintiff did so, despite the disparity between that figure and the amount to which it believed itself entitled, allegedly because a COP officer threatened to withhold payment for work already done, and in reliance on his promise that a deal would be worked out for payment based on the amount of work actually done, rather than the originally estimated amount. After the agreement had been signed and the work performed, plaintiff further alleged, the defendant refused to honor its agreement, invoking the written agreement as a bar. Far underpaid for the work it had done, plaintiff ultimately lost its bonding capacity and its ability to bid, and had to discontinue business—essentially, it died. Defendants denied plaintiff's allegations, but also moved for summary judgment, which was granted by the court on the basis of the parol evidence rule. On

489. Problems here may arise if the court insists that an ambiguity be apparent from the face of the writing itself, rather than manifesting itself only in the light of extrinsic evidence. See, e.g., *Hershon v. Gibraltar Bldg. & Loan Ass'n*, 864 F.2d 848 (D.C. Cir. 1989). Here, of course, the U.C.C./Restatement view favors consideration of all types of evidence for the purpose of interpretation, evidence of express terms as well as of course of performance, course of dealing or usage of trade. See U.C.C. § 2-202 (1995); RESTATEMENT (SECOND) § 214.

490. 815 P.2d 1135 (Mont. 1991). Commentary on this case includes extended examination in Burnham, *supra* note 457 and a shorter discussion in Mooney, *supra* note 58, at 1156-57.

appeal, the Montana Supreme Court affirmed that judgment, by a five-two vote.

Writing for the majority, Chief Justice Turnage held that summary judgment was proper because even though a defendant's motion for summary judgment ordinarily admits the facts pleaded by the plaintiff, the parol evidence rule in this case would not permit a showing of any of the oral misrepresentations or promises allegedly made to the plaintiff before the signing of the written contract. Plaintiff had attempted to invoke the fraud exception to the parol evidence rule, but this argument was rejected as not applicable where the alleged fraud relates directly to, and contradicts, the terms of the written agreement.⁴⁹¹ Ultimately, the Chief Justice concluded, the controlling principle is commercial stability:

The parol evidence rule is the public policy of Montana If this public policy and rule is not upheld, contracting parties that include lawful provisions in written contracts would be under a cloud of uncertainty as to whether or not their written contracts may be relied upon. The public policy and law does not permit such uncertainty to occur.⁴⁹²

In a strongly worded dissent, Justice Trieweler began by asserting that a motion for summary judgment requires the court to assume the truth of facts pleaded. And those facts, he declared, "offend any reasonable sense of fairness."⁴⁹³ If plaintiff's officer William Sherrodd is telling the truth, he was repeatedly assured that plaintiff would be paid on the actual amount of work done, and was told that if Sherrodd did not sign the agreement as presented it would be denied the progress payment to which it was then entitled. Bending to that pressure, Sherrodd did sign, only to be met later by defendant's refusal to honor that promise, with the end result being financial catastrophe for Sherrodd's business. Castigating the majority for its reliance on stale precedents and its indifference to "terrible injustice,"⁴⁹⁴ Justice Trieweler responded directly to the majority's invocation of commercial stability and contractor reliance as justification for its action:

The majority expresses concern that but for this decision general contractors would not be able to rely on written agreements with their subcontractors. However, general contractors who induce subcontractors to enter into a written agreement by fraudulent representations should find no security in the piece of paper which re-

491. Plaintiff's attempts to invoke the covenant of good faith and fair dealing met a similar fate; such a claim could only be based, the court held, on a violation of the express terms of the written contract. See *Sherrod*, 815 P.2d at 1137.

492. *Id.*

493. *Id.* at 1138.

494. *Id.* at 1139.

sulted from their culpable conduct. Furthermore, a justice system worth its salt should have equal compassion for Montana's many subcontractors who, while operating without the benefit of legal advice, sign whatever is necessary in order to keep their operations afloat and their crews at work.⁴⁹⁵

A jury trial to determine the merits of the plaintiff's claim, Justice Trieweiler concluded, "is really all the protection that Montana's general contractors need."⁴⁹⁶

As suggested above, *Sherrodd* seems to me a hard case, perhaps the hardest kind of case that could be imagined for testing the strength of the parol evidence rule. Maybe hard cases do make bad law, as frequently suggested. In any event, they clearly make good Rorschach tests. Just as with those suggestive inkblots, what you see in *Sherrodd* depends not only on what's there, but on what you bring to it. Chief Justice Turnage, one surmises, sees a business community beset with far-fetched and phony claims, brought by shyster lawyers with the hope of getting to gullible jurors easily persuaded to dip into someone else's pocket by a hard-luck story based more on emotion than on fact. Justice Trieweiler, on the other hand, may see a business community in which honest but vulnerable individuals are lied to, bullied and ultimately cheated by powerful companies, aided by a court system that abdicates its role as the compassionate protector of its citizenry to become the tool of the well-heeled and well-counseled.⁴⁹⁷ Professor Scott J. Burnham sees a situation calling out for both intelligence and empathy on the part of the courts, and for the creative practice of preventive law by attorneys.⁴⁹⁸ Professor Ralph James Mooney sees another example of what he calls a "new conceptualism" in contract law, a development which he regards as having "apparent . . . class-justice implications."⁴⁹⁹

And what do I see? Based on all that has gone before, it may come as no surprise that what I see is an opportunity—an opportunity for us to rethink the limits of the parol evidence rule, and the role that reliance plays in human affairs. Each party has a reliance story to tell, and each story—if true—is compelling. If *Sherrodd* is telling

495. *Id.*

496. *Id.*

497. Professor Burnham informs me that Chief Justice Turnage before his elevation to the Montana Supreme Court was Republican majority leader in the state senate, and that Justice Trieweiler was at one point president of the Montana Trial Lawyers Association, a group frequently supportive of Democratic issues and candidates. This seems to both of us to underscore the possible political implications of the world view that judges inevitably bring to cases like these.

498. Burnham, *supra* note 457, at 139-43.

499. Mooney, *supra* note 58, at 1157.

the truth, he⁵⁰⁰ has at least been misled, possibly been consciously lied to, and in any event been bullied and ultimately betrayed by the defendant's agents. In reliance on their assurances, he has completed his performance while at the same time binding himself to the very written document that may prevent him from recovering the full payment that he was promised, which he has honestly earned. To deny him his claim in these circumstances is clearly an injustice.

But what if Sherrodd's story is a lie? Then COP is being asked to pay more than Sherrodd had agreed to accept for his services, even though COP has bound itself in turn to Morrison-Knudsen, relying on Sherrodd's willingness to render his performance at the originally agreed upon figure. And all this in the teeth of Sherrodd's signing of a written contract that expressly binds him to the agreement he now repudiates. If these are indeed the true facts, then surely to allow Sherrodd his claim would also be an injustice. How should this dilemma be resolved?

In some versions of the parol evidence rule, the court will at least receive and evaluate evidence bearing on the parties' intention to truly embody their agreement in the written document. Suppose that procedure had been followed in the *Sherrodd* case, and the judge had received Sherrodd's evidence on the issue of integration, evidence which presumably would include his own testimony (and perhaps that of others) that in this case it was not the parties' intent to memorialize their entire agreement, that both parties understood the real agreement was different, and that signing the writing was just something that apparently had to be done right away for some bureaucratic reason. But suppose further that the judge had then determined that the writing was indeed intended by both parties as their full and complete agreement (and thus, inferentially, that there was no extrinsic agreement as the plaintiff contended). If the trial judge, acting as a duly-empowered trier of fact on this issue of intent, receives evidence from both sides and then honestly decides against Sherrodd because his story is not credible, then Sherrodd will lose, and he should. This is so *even if he was telling the truth*. Without the benefit of omniscience, a trier of fact (whether jury or judge) can only do its best. Even if the outcome is factually wrong, it may nevertheless be *proper*, if the system has functioned in the way it's supposed to, as best it can.

Depending on our opinions about the relative merits of trial by judge or by jury, we might be more or less content with that mode of

500. At this point I am adopting the practice of the dissenting opinion in treating Sherrodd, Inc., as being, essentially, its officer and owner William Sherrodd. For all we know, COP is a small, family-owned enterprise, too, but that doesn't come through in the opinions.

resolving the *Sherrodd* case, but at least the plaintiff would have had a chance to persuade the court of the truth of his story. So administered, the parol evidence rule imposes a cumbersome requirement that any challenge to a written contract must clear a double hurdle, first the judge and then the jury—but at least the track is laid out, and the hurdles *can* be jumped.

But that describes a relatively liberal, Corbinian view of the parol evidence rule. The harsher version of the rule, which *Sherrodd* may in fact exemplify,⁵⁰¹ takes a different tack, elevating the parol evidence rule from a set of hurdles to an insurmountable obstacle. This stronger rule seems to reflect two complementary but distinct judicial attitudes. One is that the proponent of the oral agreement cannot possibly be allowed to prevail, because no reasonable person would *behave* like that—making an oral agreement and then signing a document negating it. Such a story is just not plausible. The other attitude is that the plaintiff cannot possibly be allowed to prevail, because no *reasonable* person would behave like that. Maybe the plaintiff did in fact sign the agreement believing that he had an oral agreement otherwise, but if he did, that was not a reasonable act—or at least he couldn't reasonably expect the other party to keep its word, once he had.

The first of these two attitudes is simply a narrow and remarkably naive view of human behavior. Surely all of us have signed something we knew full well to be intended as a "contract," without reading it, because we trusted the person presenting it for our signature. We may even have been aware that the document contained language which seemed to negate promises we had received, but signed it anyway, based on the other party's assurance that nevertheless, those promises would be kept. "Oh, you don't have to worry about that," we may have been told, "You and I have our own understanding on that point;" "You can rely on our word on that;" "We've never used that clause against anyone who's doing a good job for us." And finally, and ironically, what is probably presented as the clincher: "That's just something the lawyers make us put in."

For a judge to say he literally cannot believe that people behave this way is like Captain Renault's profession of shock, *shock* at the discovery of gambling in Rick's casino; it's just, well, not credible. What the judge is really saying, we cannot help but suspect, is that although people in fact do behave that way, the judge does not believe that they reasonably *should*—that such behavior must be, per se, *un-*

501. There is no suggestion in the majority opinion in *Sherrodd* that the trial judge held an evidentiary hearing on the issue of integration before granting summary judgment to the defendant.

reasonable, and therefore out of reach of the legal system's protection. Under this view, whether the oral agreement was really made is not decisive, or even particularly important. What matters is that trusting in someone's oral promise is simply not reasonable behavior if you know (or, maybe, *should* know) that the writing you signed does not reflect that oral promise.

Here, ultimately, is where the roads of reliance diverge, and, like Robert Frost's traveler, we have to choose. In his opinion in *Sherrodd*, Chief Justice Turnage talks of reliance on "written contracts." In section 90, the Restatements also talk of reliance, in this case reliance on a "promise." To some extent, there is overlap here—a written contract is, after all, essentially just a collection of promises, and relied-on promises are frequently made in writing. But the difference between the tough, Turnage-type parol evidence rule and the Restatement's vision of promissory estoppel is not mere lack of congruence; as Professor Burnham has suggested, there's a fundamental difference in world-views.⁵⁰² This difference can be framed in many ways. Proponents of a strong parol evidence rule may see it simply as the difference between tidiness and sloppiness, or as the difference between prudence and heedlessness, and those factors surely play a part. But at the most basic level, it's the difference between a world that runs on paper, and a world that runs on face-to-face communication—between a world that says "I don't believe it unless I see it in writing, and I won't *do* it unless a writing tells me to," and a world that says, "If you assure me this is so, I will take you at your word, and rely on that, as you well know."

Each one of us lives, simultaneously, in both of those worlds. We have no choice in the matter. If the parol evidence rule forces a court to envision our world as being one where *only* paper matters, or—the slightly weaker version—a world where paper *always* prevails over face-to-face communication, then that rule forces the court (along with the rest of us) to deny something we know to be true. And that something is simply this: There are situations where it is, truly, more reasonable to rely on a spoken word of commitment than on a piece of paper, signed or not. And there should be.

Even assuming you are with me so far, your next logical question must be: So what? More specifically, what could promissory estoppel do for this area of contract law that other existing exceptions to the parol evidence rule don't already do, and probably just as well?

With the possible exception of fraud (to which I will return shortly below), no existing strand of parol evidence doctrine requires the court to focus explicitly on the extent to which the proponent of a

502. See *supra* text accompanying note 475.

writing actually and reasonably relied on the existence and terms of that writing, as compared with the extent to which the proponent of an oral agreement (potentially inconsistent with the writing) actually and reasonably relied on the existence and terms of that oral agreement. If the parol evidence rule were forced to submit to the discipline of promissory estoppel, as other contract doctrines have commonly been made to do, then in a case like *Sherrodd* it would not be enough for the majority opinion to refer in some general way to reliance on written contracts. The court would have to address the question of whether *this* defendant truly did reasonably and detrimentally rely on *this* written agreement as expressive of the real and only agreement of its agreement with the plaintiff, or whether conversely *this* plaintiff did in fact reasonably and detrimentally rely on the defendant's assurance that *this* oral agreement was real and reliable, the writing notwithstanding.

In the course of that examination, the court might also consider the question—seemingly implicit in Chief Judge Turnage's opinion, but not stressed—of whether parties other than the defendant had also relied in substantial ways on this written agreement, and whether if taking that form of reliance into account as well, more injustice would result from upholding the oral agreement than would flow from rejecting it. But again, that's only one side of the coin; in line with the reference to third parties in Restatement (Second) section 90, the court could also consider whether persons other than the plaintiff could and did reasonably rely on the asserted oral agreement, so that some injustice to them might result from refusing to enforce it.

Could the answers to these questions about reliance ever be that in fact *both* parties did reasonably, foreseeably and detrimentally rely—one on the writing, the other on the oral agreement? Yes, they could. One example: Two parties have a written agreement; they also have a supplementary oral agreement, but there is a genuine misunderstanding between them as to its meaning. One party's understanding of that oral agreement is consistent with their written agreement; the other party's is not. In such a case, should the writing-compatible version automatically prevail? My personal answer would be no, it shouldn't. Here, the court should try to assign responsibility for the misunderstanding to one party or the other, as it does in other areas of contract law.⁵⁰³ But, one could instead adopt a tie-breaking rule that says that in such cases of genuine misunderstanding, the writing always wins. Such a rule seems to me problematic; neverthe-

503. See generally RESTATEMENT (SECOND) §§ 200-03 (discussing interpretation of contracts).

less, it would be an distinct improvement on the *Sherrodd* ties-aren't-even-possible approach.

Another kind of double-reliance problem may arise when an agent with apparent authority to act generally with respect to a transaction makes promises or representations that conflict with the writing.⁵⁰⁴ This situation is complicated by the agency factor, but is essentially the same problem as before. One side is relying on the writing to negate the appearance of authority and thereby avoid such problems, while the other is relying on the agent's appearance of authority to make the promises or representations relied on. Whether in this case *both* parties can have acted reasonably is an interesting question; probably they could. What does seem clear (to me) is that given the tension between writing and speech, it would be wrong to assert that in such a case the principal is *always* reasonable, and the other party can *never* be.

I suggested earlier that, with the possible exception of fraud, none of the established limitations on or exceptions to the parol evidence rule addresses directly the question of reliance. The threshold issue of integration has no stated reliance ingredient; however determined, it turns on the parties' intention at the time their agreement was made. Some of the traditional exceptions are essentially attempts to circumvent the parol evidence rule by undermining the contract it purportedly embodies. Thus, if there was an "oral condition precedent" to the agreement becoming effective, that may be shown by parol, not because it doesn't conflict with the writing (it probably does

504. The writing might negate that particular promise or representation, by a contradictory express term; it might also negate generally the agent's authority to make agreements or representations not expressed in the writing, in an effort to stave off just this sort of challenge to the autonomy of the writing. Nevertheless, as in other cases where speech and writing conflict, it may in the circumstances have been reasonable for the other party to rely on what the agent said and did, rather than on the words of the writing. Cf. RESTATEMENT (SECOND) OF AGENCY § 166 cmt. e (1958):

e. Although a principal notifies those dealing with the agent that the agent is not authorized to make particular statements, if the principal believes or has reason to believe that the agent will make such statements and that these will be relied upon by persons with whom the agent deals, he is subject to liability if such statements are made by the agent and relied upon by the third person. . . . If it is provided in the contract that the agent is not authorized to make representations not contained therein, the parol evidence rule may prevent the introduction of such evidence as part of the contract; but if such statements are made and induce the contract, the transaction can be rescinded at the election of the third person.

See also RESTATEMENT (SECOND) OF AGENCY § 260 and cmts. c and d (1958) (innocent principal may by contract language insulate itself from liability for agent's misrepresentation but not from "relatively mild remedy of rescission" for other party, at least until principal has changed position in reliance on existence of contract; rule does not offend parol evidence rule because contract is avoided, not enforced).

conflict, at least implicitly), but because until the conditioning event occurs, there is in theory no "contract," and thus nothing for the parol evidence rule to protect.⁵⁰⁵

The "fraud" exception is a similar stratagem. If the agreement has been procured by fraud, so runs the traditional argument, then under established principles it is voidable. If it is voidable, then it's not truly a "contract" at all, and the parol evidence rule will not protect it. *Voila!* One arm of the fraud rule is aimed at "fraud in the factum," where the signer is deceived about the nature of what she is signing—is led to believe that it's just a receipt, perhaps, or has a document switched on her before she signs.⁵⁰⁶ But such fraud seems relatively rare. Much more likely is "fraud in the inducement," oral misrepresentations of fact or fraudulent promises made by one party to induce the other party to sign on to the contract. Should evidence of such fraud be admissible, despite the parol evidence rule? Many courts will say yes, because "fraud vitiates every contract."⁵⁰⁷ Others, like the Montana court in *Sherrodd*, will say no, not if this is merely a way to show a representation or promise that otherwise could not be shown because we're dealing with an integrated writing. To be admissible, that court declares, the fraud must not "relate directly to the subject of the contract."⁵⁰⁸

Under the *Sherrodd* approach, then, assertions of fraud are likely to run up against the same brick wall that awaits ordinary evidence of an extrinsic oral agreement. But in more lenient jurisdictions, the plaintiff may succeed in circumventing the parol evidence rule by showing either fraudulent misrepresentations or fraudulent prom-

505. That, at least, was the rationale of the leading case for this exception. See *Pym v. Campbell*, 119 Eng. Rep. 903 (Q.B. 1856). This exception is commonly stretched beyond its original theoretical base to permit more general conditions to be shown, conditions which do not necessarily go to the existence of the contract, but only to a duty of performance under it. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3.7(a), (b) (3d ed. 1987); FARNSWORTH, *CONTRACTS*, *supra* note 16, § 7.4 at 480-81 & nn.6-9. The Restatement (Second) explains this exception not on the basis stated in the text, but as an application of the "collateral agreement" principle or as an instance of incomplete integration. See RESTATEMENT (SECOND) § 217 cmt. b and reporter's note to cmt. b.

506. *E.g.*, *Park 100 Investors, Inc. v. Kartes*, 650 N.E.2d 347, 349 (Ind. Ct. App. 1995) (personal guaranty agreement signed by individual stockholders would not be enforced where lessor's agent had represented papers presented for signature as being already-agreed-to lease binding only on lessee corporation). This type of fraud is the "fraud in the factum" that will survive negotiation of an instrument to a holder in due course. See U.C.C. § 3-305(a)(1)(iii) cmt. 1, para. 5 (1995).

507. See, *e.g.*, *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 608 (N.Y. 1959) (Fuld, J., dissenting (*quoting* *Bridger v. Goldsmith*, 38 N.E. 458, 459 (N.Y. 1894))); *Coson v. Roehl*, 387 P.2d 541 (Wash. 1963).

508. *Sherrodd, Inc. v. Morrison-Knudsen Co.*, 815 P.2d 1135, 1137 (Mont. 1991).

ises—i.e., promises made without an intention to perform (this being another traditional species of “fraud”). In either case, the proponent of the evidence must show that she reasonably relied on the fraudulent representation or promise. So in this respect, the fraud exception is truly a reliance-based exception, and an important and useful one. But it seems to me to be inferior to a frank application of promissory estoppel, in two respects.

One of these is the conceptual basis of the justification being invoked for admission of the evidence. As indicated, the reason why evidence of fraud has traditionally been admissible is a technical, indeed a “classical” one: Where there is fraud, there is no contract; where there is no contract, there can be no application of the parol evidence rule. Promissory estoppel, on the other hand, is not this sort of doctrinal manipulation, but a simple application of equity principles: Reasonable reliance on a trust invited should be protected. Whether or not one accepts the outcome, it is difficult to quarrel with the *Sherrodd* court’s assertion that the traditional fraud exception is just an attempt to get into evidence matter that the parol evidence rule would prohibit. Of course it is; that’s just the point. A frank application of promissory estoppel would not evade that admission, but would assert that in a proper case the parol evidence rule should bend to a stronger and more universal principle: The principle of reliance protection.

The second advantage that promissory estoppel may hold over the fraud approach is its more expansive reach. Even in a jurisdiction more receptive than Montana to the admission of fraud evidence, it will probably be necessary to show either a fraudulent misrepresentation of fact, or a promise made with the intention of breaking it (or at least with no real intention of performing). The mere making and breaking of a promise doesn’t establish that kind of fraudulent intent; something more is needed, and that something more may be impossible to prove. Promissory estoppel, on the other hand, doesn’t require that degree of culpability on the part of the promising party. What it does require is an apparently serious and reliable promise, on which the other party actually and foreseeably relies, to her detriment.

Why has fraud remained a well-marked (if narrow) road around the parol evidence rule, while promissory estoppel has yet to clear a visible trail? For two reasons, probably. One is simply that classical-minded courts are happier with the more conceptual justification advanced for the fraud exception; it fits with their formalistic overall approach. More broadly, the fraud exception has visceral appeal because the possibility of active lying on the defendant’s part makes the plaintiff’s case more sympathetic. But recall again the facts of *Sherrodd*: Even if we assume generally the truth of the plaintiff’s asser-

tions, it still may be that the defendant's agents were neither lying nor consciously making promises they intended to break when they induced Sherrodd to sign onto the written contract. Should that factor be crucial? Either way, the plaintiff's reliance was just as real, just as reasonable—and just as catastrophic in its result. If anything, it may be even more reasonable to rely on the sincerity of someone who in fact is *not* consciously lying, than to be hoodwinked by one who is.

More might be said about the parol evidence rule or other particular contract doctrines as potentially affected by promissory estoppel. At this point, however, we should round off our discussion by returning to the broader theme with which we began: The relation between contract law in general and the principle of reliance protection.

Conclusion

At the end of every class session, there comes a point when the pens and notebooks start to click shut—or, in the modern world, when the laptop lids begin to lower. If the message hasn't already been delivered, it may be too late, but in any case it's now or never. Without attempting here to recapitulate all that has gone before—your lids may be lowering, too—let me leave you with three simple propositions regarding the place of reliance protection in contract law.

The first of these is that there is more to reliance protection than just “promissory estoppel.” It has been my experience that when one first focuses on something previously unknown or unnoticed, one is often surprised by its omnipresence. Buy a new automobile of a given make and model, and you are apt to discover that the highways are suddenly swarming with cars just like yours. Realize that your old washing machine is probably on its last legs, and you will find that the newspaper ad inserts are bursting with messages from appliance dealers who would like to sell you a new one. Find yourself facing some surgical procedure, and your world will be peopled with survivors of similar surgery, with stories to tell. Like radio waves in the ether, these things have been there all along; you just haven't been tuned in.

So it is, I suggest, with reliance protection. If you examine the Restatement (Second) to discover situations where the presence or absence of reliance may have legal consequences, you will easily identify not only the seminal section 90,⁵⁰⁹ but its second-generation spin-

509. The principle of which is now expressly referred to in comment a to section 90 (but not in the rule itself) as “promissory estoppel.” See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1979).

offs, such as sections 87(2) (reliance on unaccepted offer), 89(c) (reliance on modification), 139 (reliance overcoming statute of frauds), and 150 (reliance on oral modification of an agreement subject to a statute of frauds). But closer inspection reveals those to be only the tip of an iceberg; in addition to these manifestations of "promissory estoppel," there are literally dozens of references in the Restatement (Second) to the possibility that one of the parties will have changed its position in reliance on some commitment by the other.⁵¹⁰ This factor of reliance is seen as potentially important or even decisive on a host of issues, *e.g.*: imposition of initial obligation on a promise;⁵¹¹ application of the rules of offer and acceptance;⁵¹² availability of power of avoidance;⁵¹³ availability of relief for fraud or misrepresentation;⁵¹⁴ determining existence and materiality of breach;⁵¹⁵ assessment of remedies.⁵¹⁶

In short, our common law of contract—at least as reflected in the Restatement (Second)—repeatedly recognizes and protects the substantial and detrimental changes of position that can result when one person reasonably relies on another's manifestations of commitment. The point, here, is not that each of these various examples of reliance protection is of particular importance, taken singly; many of them clearly are not. Taken together, however, they reveal that the handful of rules we have come to call "promissory estoppel" is not some aberrational displacement of an otherwise orderly pattern of law, but an integral part of that pattern—not a hole where the carpet has worn through, but a recurrent motif, woven into the fabric itself.

And this, I respectfully suggest, is where the "promise theorists" are doing both promissory estoppel in particular and contract law in

510. A list of Restatement (Second) provisions (more than just illustrative, but probably short of exhaustive) could include the following sections, all of which have somewhere either in the statement of the rule or in its commentary an express reference to the fact that reliance by one party could have a decisive or at least material effect on some issue: §§ 15, 27, 34, 38, 40, 45, 63, 69, 84, 85, 86, 87, 88, 89, 90, 129, 130, 139, 150, 153, 158, 164, 167, 168, 169, 170, 171, 172, 175, 177, 178, 197, 218, 227, 228, 229, 230, 241, 256, 271, 272, 273, 284, 311, 323, 332, 344, 349, 351, 373, 370, 376, 378, 381, 382 (1979).

511. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 34(3), 86 cmt. b, 88(c), 89(c), 90 (1979).

512. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 38 cmt. a, 40 cmt. b, 63 cmt. c, 69 cmt. c, 87(2) (1979).

513. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 15(2), 153 cmt. d, 164(2), 175(2), 177(3), 178(2)(b), 381(3)(b) (1979).

514. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 167-172 (1979).

515. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 84(2)(b), 229, 230(3), 241(c), 256, 271 (1979).

516. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 158(2), 197 cmt. b, 272(2), 344(b), 349, 351(3) (1979).

general a disservice. By insisting that the essential core of contract was, is now, and ever shall be *promise*, they either exclude or marginalize the factor of reliance, thereby obscuring the degree to which the structure of contract law once did, now does and probably always will reflect and respond to the sight of reliance uncompensated, induced by a trust invited and then violated. Undoubtedly there are many instances where a contractual obligation exists in the complete absence of any reliance at all, purely on the strength of a bargain struck.⁵¹⁷ Indeed, if Farber, Matheson and Barnett are right, there may be more such cases than we thought. But Fuller & Perdue were also right, sixty years ago, and they still are—a promise relied on and then broken does present a stronger case for protection than just a promise broken. Even if the doctrinal bars are generally lowered, there will surely continue to be a variety of cases where an injury to the reliance interest will be protected although a pure loss of expectation would not.⁵¹⁸

My penultimate proposition is that while promise-enforcement may often seem oblivious to the factor of reliance, the converse does not follow: Reliance-protection can never be oblivious to the factor of promise—of *commitment*. Reliance in the air, so to speak, is like negligence in the air—“[it] will not do.”⁵¹⁹ If one is relying at all—and certainly if one is *reasonably* relying—it must be on some commitment, expressed by another. To be sure, the express promise (written or spoken) may shade imperceptibly into the commitment which is implicitly made as a result of words and conduct, viewed in the light of surrounding circumstances, and courts may construct ancillary promises from the raw material of other promises more explicitly made. But the heart of promissory estoppel is a promissory commitment reasonably understood to have been expressed by one party, upon which the other party can and does, reasonably and foreseeably, rely.

Here is where Gilmore, Macneil and others appear to me in-

517. It should be remembered that even though an obligation exists in theory, in many cases no remedy will in fact be available unless and until some detrimental change of position has occurred, at least in the form of an unfavorable (to the plaintiff) shift in the market. Since a promise made as part of a bargained-for exchange generates only a *net* expectation, its breach may either inflict no injury at all, or else an injury which is reasonably mitigatable and will thus generate no recovery (whether or not the mitigation actually takes place).

518. I am referring here to the threshold issue of legal protection or no, not to the related but clearly distinct question of whether such protection should take the form of a remedy confined to the compensation of reliance.

519. The allusion is to Judge Cardozo's language in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (1928) (quoting POLLACK, TORTS 455 (11th ed.)).

clined to go too far in the other direction, blurring the line between commitments which have been voluntarily assumed and those that are socially imposed. One may concede that the line between the two is wavering, illogical and marked by needlessly confusing overlaps, and yet feel that there is a fundamental difference between the two types of obligations, a difference worth preserving in the structure of the law.⁵²⁰ While tort law deals with conduct that flouts general notions of proper behavior in society, contract law addresses injuries occasioned by the breaking of commitments voluntarily expressed. So too does promissory estoppel. Because it does, it rightfully belongs in the domain of promise-enforcement, which conventionally we call contract law; it should neither be exiled nor shanghaied across the border.

My final proposition, like the two before it, concerns the proper role for reliance protection. But here I am concerned not so much with the structure of the law as with its effect, seen from the layperson's perspective. To the consumers of our legal system, does it really matter where we pigeon-hole promissory estoppel and the other forms of reliance protection, so long as we know where they are, and can find them when we need them?

My answer is that it does matter, and that it may indeed matter a great deal. Over a century, American contract law appears to have changed its course. Maybe it truly was hijacked by Gilmore's buccaneering band of Holmes, Langdell and Williston. Maybe it just took a different tack because of a vastly more complicated interplay of persons, events, and social and economic forces. That may not matter much now, if it ever did. In any event, American contract law has for much of this century been embarked on a voyage of rediscovery, retrieving and reviving doctrines and approaches that were jettisoned to make room for the first-class passengers of the Gilded Age. Thanks to the prodigious intellectual and moral efforts of commentators like Corbin and Llewellyn, and a host of judges both famous and obscure, the equity side of contract law has been thawed out, nourished, and gradually nursed back to health. This revival can be seen in many areas: expansion of the notions of fraud, duress, and undue influence; emphasis on concepts like unconscionability, good faith and fair dealing; attention to course of performance and course of dealing as keys to reasonable expectation; efforts to solve the riddle of standardized forms. All these represent the equitable half of contract

520. For one classic exposition of this view, refer to Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975), (reviewing Gilmore's *Death of Contract* and reaffirming the continued strength of contract in the modern legal system).

law, reasserting itself. But reasserting itself, it should be understood, with the aim not of replacing existing contract law, but of complementing it.

And this, finally, is what it all comes down to. For our contract law system to work properly, it cannot consist only of law, any more than it could consist only of equity. Equity without law would be tyranny indeed—shapeless, unpredictable, reflecting nothing more than the judge's personal predilections. But in the contract area, as we have seen, law without equity can be tyranny, too: Cold and unfor- giving; rewarding wealth and power with still greater wealth and power; repaying trust with betrayal; and finally—tritely but truly— adding insult to injury.⁵²¹ With the aid of equitable doctrines like prom- issory estoppel to counter-balance the weight of legal rules, the courts in this area can continue the never-ending process of tightrope- walking that is contract decision-making. Without them, we are back where we were a century ago.

The foregoing may sound like a political argument. It is, and is meant to be. All law, it has been suggested, is politics, and in our sys- tem, that is largely true: The act of law making is an inherently politi- cal process, whether it takes place at the ballot box, in the halls of ex- ecutive power, or in the legislative arena. Do the foregoing observations apply also to the courts? Of course they do. Since the

521. See, e.g., *Sherrodd, Inc. v. Morrison-Knudsen Co.*, 815 P.2d 1135 (Mont. 1991); *supra* text accompanying notes 490-501. Another excellent example is *Wior v. Anchor Industries, Inc.*, 669 N.E.2d 172 (Ind. 1996). In this case, the Indiana Supreme Court reversed a three-two decision of the Indiana Court of Appeals, which had held (reversing a trial court grant of summary judgment for defendant) that plaintiff Wior should be per- mitted to go to trial on his action for wrongful discharge, despite the absence of a written em- ployment contract. See *Wior v. Anchor Industries, Inc.*, 641 N.E.2d 1275, 1281 (1994). The plaintiff asserted that in accepting what would otherwise have been an employment at will as a plant supervisor of one of defendant's manufacturing plants, he had asked for and re- ceived from defendant an assurance that his employment would be for "a position of per- manence" (until retirement in "20 plus years"), without which assurance he would not have been willing to discontinue his consulting business and move his family from Indian- apolis to Evansville. Although the Court of Appeals treated the plaintiff's alleged em- ployment agreement as essentially one for lifetime employment, so that the statute of frauds one-year clause would not apply (applying a traditional narrow view of the statute on this point), the Indiana Supreme Court ruled that plaintiff's alleged employment agreement was in reality for a twenty-year term, and thus within the statute of frauds. Moreover, it held that plaintiff had not furnished sufficient "independent consideration" for the asserted promise of permanent employment. Perhaps plaintiff did have "unique skills," the Supreme Court conceded, but plaintiff's business "had not yet reached its po- tential," and "was earning relatively little money." 669 N.E.2d at 177-178. In other words, if plaintiff didn't really need the job with defendant, he could protect himself by a contract for permanent employment; if he did, however, he couldn't. Catch-22. To quote again Professor Ralph James Mooney, the "class-justice implications" of such a decision are all too apparent. See *supra* note 499, and accompanying text.

heyday of Karl Llewellyn and his cohorts, we have understood that courts do not merely administer the law, but create it as well. In some subject-matter areas, the law-making function has been largely assumed by the legislature, with courts playing only the subsidiary role of interpreting statutes and regulations. Not so with contract law, however. In the present-day Nineties just as in the last ones, contract law remains not only judge-administered, but judge-made. For this reason, contract, of all areas of law, is the one where judges should be least open to accusations of improper "activism." Contract law is not only administered by judges, it was formed by judges, and when appropriate can and should be reformed by judges.

And this is why arguments about contract law are ultimately, and inescapably, political. Unless and until the legislature exercises its prerogative of codifying the rules of contract law, those rules must continue to be molded and shaped by the courts, in the crucible of case and controversy. As trustees of our law-making power in this area, courts have the responsibility of balancing the interests of different types of enterprises, of different kinds of individuals, and of all classes of society. Besides treating the litigants before them in a fashion that comports both with law and with equity, courts must consider the effect of their decisions on all the rest of us: Buyers as well as sellers, debtors as well as creditors, and insureds as well as insurers; small enterprises as well as large; individuals as well as corporations; the poor as well as the rich. And, despite all the intangible personal and professional ties that may pull the other way, they must in fashioning their decisions take into account the interests not only of those who do have effective legal counsel when entering into agreements, but also *of those who do not*.

As the Twentieth Century ticks off its last hours, we are told that our global computer system—upon which virtually all of modern civilization seems to depend—may be thrown into confusion by the arrival of the year 2000. Originally (and myopically) instructed to treat all years as two-digit affairs, our computers may read the year "00" as "1900," dragging us all willy-nilly back into the past—back, indeed, to the year 1900, when Langdell, Holmes, and Williston held sway over the world of contract law. It appears that, given the chance, some courts and commentators would also make that return trip to the golden age of classical contract, leaving much of modern contract law behind, lost in some sort of inaccessible time warp.

Can promissory estoppel be preserved? Can reliance be rescued? Can the equitable heart of contract law be protected from the Paper-Chasing neoconceptualists? The battle is never finally won, of course, but neither is it ever finally lost. Stay tuned.

